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# Promoting Prosecutorial Accountability, Independence and Effectiveness (edited by Timothy Waters and Belinda Cooper)

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# **PROMOTING PROSECUTORIAL ACCOUNTABILITY, INDEPENDENCE AND EFFECTIVENESS**

Comparative Research

JUSTICE

2008



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# PROMOTING PROSECUTORIAL ACCOUNTABILITY, INDEPENDENCE AND EFFECTIVENESS

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*Comparative Research*



2008

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# PROMOTING PROSECUTORIAL ACCOUNTABILITY, INDEPENDENCE AND EFFECTIVENESS

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*Comparative Research*

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# Contents

**Acknowledgements** | 13

**Foreword** | 15

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## **Overview:**

**Design and Reform of Public Prosecution Services** | 19

Timothy Waters

**A.** Introduction | 21

I. Purpose of the Project | 21

II. Project Structure and Methodology | 23

**B.** Findings: Policy and Practice in the Design of Prosecution Services | 24

I. General Issues | 24

1.1. Independence, neutrality, and accountability | 25

1.2. Effectiveness and efficiency | 29

1.3. Measuring performance | 31

1.4. International standards | 32

II. Structure and Organization of the Public Prosecution Service | 35

2.1. Internal structure | 36

2.2. Budgetary process | 39

2.3. The status of the prosecutor general | 42

2.4. The status of individual prosecutors | 44

2.5. Individual accountability of prosecutors | 48

2.6. Training | 51

III. Functions and Powers of Prosecutors | 52

3.1. Prosecutorial functions in criminal justice | 53

3.2. Relationship with the judge at the pre-trial stage | 58

3.3. Powers outside the criminal justice system | 59

IV. Relationship of the Public Prosecution Service  
to Other Organs of the State | 61

4.1. The constitutional location of the public prosecution service | 61

4.2. Relations with the legislature | 63

4.3. Relations with the executive | 65

4.4. Relations with the police and other investigative organs | 68

4.5. Relations with the judiciary | 70

- V. Information Control concerning the Prosecution Service's Activity | 73
- VI. The Use of Statistics | 77

---

## Report on the Bulgarian Prosecution Service

Yonko Grozev

- I. General Issues | 83
- II. Structure and Organization of the Prosecution Service | 85
  - 2.1. Internal structure | 85
  - 2.2. Budgeting process | 87
  - 2.3. The status of the prosecutor general | 89
  - 2.4. The status of individual prosecutors | 91
  - 2.5. Individual accountability of prosecutors | 93
  - 2.6. Training | 96
- III. Functions and Powers of Prosecutors | 96
  - 3.1. Prosecutorial functions in criminal justice | 96
  - 3.2. Relationship with the judge at the pre-trial stage | 99
  - 3.3. Powers outside the criminal justice system | 100
- IV. Relationship of the Prosecution Service to Other Organs of the State | 100
  - 4.1. The constitutional location of the prosecution service | 100
  - 4.2. Relationship with the legislature | 102
  - 4.3. Relationship with the executive | 103
  - 4.4. Relationship with the police | 106
  - 4.5. Relationship with the judiciary | 110
- V. Publicizing the Prosecution Service's Activities | 112

---

## Report on the *Ministerio Público* and the Reform of Prosecution in Chile

Todd Foglesong

- I. General Issues | 115
  - The Reasons and Rationales for Reform in Chile | 116
- II. Structure and Organization of the Prosecution Service | 119

2.1.	Internal structure	119
2.2.	Budgetary process	119
2.3.	The status of the Prosecutor General and senior Regional Prosecutors	120
2.4.	The status of individual prosecutors	121
2.5.	Individual accountability of prosecutors	122
2.6.	Training	123
III.	Functions and Powers of Prosecutors	124
3.1.	Prosecutorial functions in criminal justice	124
3.2.	Relationship with the judge at the pre-trial stage	127
3.3.	Powers outside the criminal justice system	128
IV.	Relationship of the Prosecution Service to Other Organs of the State	128
4.1.	The constitutional location of the prosecution service	128
4.2.	Relationship with the legislature	129
4.3.	Relationship with the executive	131
4.4.	Relationship with the police	132
4.5.	Relationship with the judiciary	133
V.	Publicizing the Prosecution Service's Activities	134
VI.	Statistics and Appendices	136
	Crime, Victimization, and Public Safety	136

---

## Report on the Crown Prosecution Service of England and Wales

Anton Girginov, Barry Hancock

I.	General Issues	143
II.	Structure and Organization of the Crown Prosecution Service	145
2.1.	Internal structure	145
2.2.	Budgetary process	147
2.3.	The status of the prosecutor general	148
2.4.	The status of individual prosecutors	149
2.5.	Individual accountability of prosecutors	150
2.6.	Training	151
III.	Functions and Powers of Prosecutors	152
3.1.	Prosecutorial functions in criminal justice	152
3.2.	Relationship with the judge at the pre-trial stage	156
3.3.	Powers outside the criminal justice system	156
IV.	Relationship of the public prosecution service to other organs of the state	157

4.1.	The constitutional location of the Crown Prosecution Service	157
4.2.	Relations with the legislature	158
4.3.	Relations with the executive	158
4.4.	Relations with the police	159
4.5.	Relations with the judiciary	162
V.	Publicizing the Prosecution Service's Activity	163
VI.	Statistics	163
	Bibliography	164
	Annex A	165

---

## Report on the Prosecution Service in France | 175

Rada Smedovska, François Falletti

I.	General Issues	177
II.	Structure and Organization of the Prosecution Service	178
2.1.	Internal structure	178
2.2.	Budgetary process	181
2.3.	The status of the Prosecutor General	182
2.4.	The status of individual prosecutors	182
2.5.	Individual accountability of prosecutors	186
2.6.	Training	189
III.	Functions and Powers of Prosecutors	190
3.1.	Prosecutorial functions in criminal justice	190
3.2.	Relationship with the judge at the pre-trial stage	193
3.3.	Powers outside the criminal justice system	193
IV.	Relationship of the Prosecution Office to Other Organs of the State	195
4.1.	The constitutional location of the prosecution service	195
4.2.	Relations with the legislature	196
4.3.	Relations with the executive	197
4.4.	Relations with the police and with investigative organs other than the police	201
4.5.	Relations with the judiciary	204
V.	Information Control	205
VI.	Statistics	207
VII.	Bibliography	208



---

## Report on the Public Prosecution Service in Germany

Ekaterina Trendafilova, Werner Róth

- I. General Issues | 213
- II. Structure and Organization of the Public Prosecution Service | 216
  - 2.1. Internal structure | 216
  - 2.2. Budgetary process | 218
  - 2.3. The status of the Prosecutor General | 219
  - 2.4. The status of individual prosecutors | 220
  - 2.5. Individual accountability of prosecutors | 224
  - 2.6. Training | 225
- III. Functions and Powers of Prosecutors | 227
  - 3.1. Prosecutorial functions in criminal justice | 227
  - 3.2. Relationship with the judge at the pre-trial stage | 233
  - 3.3. Powers outside the criminal justice system | 235
- IV. Relationship of the Public Prosecution Service to Other Organs of the State | 235
  - 4.1. The constitutional location of the public prosecution service | 235
  - 4.2. Relations with the legislature | 236
  - 4.3. Relations with the executive | 237
  - 4.4. Relations with the police and other investigative authorities | 239
  - 4.5. Relations with the judiciary | 242
- V. Information Control | 243
- VI. Statistics | 245

---

## Report on the Public Prosecution in Hungary | 247

Endre Bócz

- I. General Issues | 249
- II. Structure and Organization of the Public Prosecution Service | 251
  - 2.1. Internal structure | 251
  - 2.2. Budgetary process | 259
  - 2.3. The status of the Prosecutor General | 261
  - 2.4. The status of individual prosecutors | 262
  - 2.5. Individual accountability of prosecutors | 267
  - 2.6. Training | 269

III. Functions and Powers of Prosecutors	270
3.1. Prosecutorial functions in criminal justice	270
3.2. Relationship with the judge at the pre-trial stage	275
3.3. Powers outside the criminal justice system	277
IV. Relationship of the Public Prosecution Service to Other Organs of the State	279
4.1. The constitutional location of the Public Prosecution Service	279
4.2. Relations with the legislature	280
4.3. Relations with the executive	282
4.4. Relations with police and investigators	283
4.6. Relations with the judiciary	286
V. Information Control	288
VI. Use of Statistics	292

---

## Prosecutorial Accountability, Independence, and Effectiveness in Italy

Giuseppe Di Federico

I. General Issues	301
II. Formal Structure of the Public Prosecution Service and Some Basic Features of the Role of Prosecutors in Criminal Proceedings	303
III. The Superior Council of the Magistracy (SCM)	306
IV. Recruitment, Professional Evaluations, and Career of Prosecutors and Judges	309
A. Recruitment and promotion of prosecutors and judges	309
B. Promotion without evaluation	311
C. Transfer of prosecutors	313
D. Independence and the greater discretion of the SCM in decisions affecting expectations of prosecutors and judges	313
E. Independence and extrajudicial activities	314
F. Independence, salaries, pensions, and retirement bonuses	316
V. The Ministry of Justice and Prosecutorial Independence	318
VI. The Constitutional Principle of Compulsory Criminal Action and its Implications at the Operative Level	321
VII. Relations Among the Prosecution Offices	324
VIII. The Internal Organization of the Prosecution Offices and the Independence of Each Prosecutor	326
IX. Relationship Between Prosecutors and Judges	333

X.	Effectiveness of the Prosecution Service: Statistics	335
XI.	Current Reforms	336
XII.	Closing Remarks	338

---

## Report on the South African National Prosecuting Authority

Anton du Plessis, Jean Redpath, Martin Schönteich

I.	Background	343
	South Africa's prosecution service	344
	Recent strategic developments	346
II.	Structure and Organization of the National Prosecuting Authority	347
	2.1. Internal structure of the National Prosecuting Authority	347
	2.2. Internal structure of the National Prosecution Service	349
	2.3. Budgetary process	352
	2.4. The status of the Prosecutor General (National Director) and his deputies	353
	2.5. The status of individual prosecutors	355
	2.6. Individual accountability of prosecutors	357
	2.7. Training of prosecutors	358
III.	Functions and Powers of Prosecutors	359
	3.1. Prosecutorial functions in criminal justice	359
	Control of On-Going Prosecution	364
	3.2. Relationship with the judge at the pre-trial stage	367
	3.3. Powers outside the criminal justice system	369
IV.	Relationship of the Prosecution Service to Other Organs of the State	370
	4.1. Political developments affecting the NPA	370
	4.2. Relationship with the legislature	372
	4.3. Relationship with the executive	374
	4.4. Relationship with the police	376
	4.5. Relationship with the judiciary	380
V.	Publicizing the Prosecution Service's Activity	381
VI.	Statistics	382

---

# Prosecutor Organization and Operations in the United States

Heike Gramckow

- I. General Issues | 387
- II. Structure and Organization of the Prosecution Service | 390
  - 2.1. Structure of the prosecution services | 390
  - 2.2. Independence of prosecutorial decision-making, accountability, and safeguards in the system | 392
  - 2.3. Internal supervisory and accountability structures | 397
  - 2.4. The status and accountability of individual prosecutors | 399
  - 2.5. Selection requirements and training | 403
  - 2.6. Prosecutor budgets and finances | 405
- III. Functions and Powers of Prosecutors in the Criminal Process | 407
- IV. The Relationship Between the Prosecution Service and Other State Structures | 414
  - 4.1. Relationship with the legislature | 414
  - 4.2. Relationship with the executive | 416
  - 4.3. Relationship with the police and other investigative organs | 417
  - 4.4. Relationship with the judiciary | 420
  - 4.5. Relationship with and role of the defense bar | 422
- V. Information Control | 423
  - Public and media relations | 423
- VI. Use of Statistics and Performance Measures | 425
- VII. Trends | 427
  - Attachment A | 430

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**Project team. Biographies | 433**

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A tremendous debt of gratitude is owed the authors of the country reports, whose names are appended to the chapters they researched and wrote. Without their hard work and dedication this book would not have materialized. Their keen understanding of the role and function of their country's prosecution service is reflected in the high quality of the country chapters.

Timothy Waters developed the structure for the country reports. As initial editor of this volume, he patiently provided guidance and support to the reports' authors. He also wrote the introductory overview report which sets the scene for the chapters that follow. Belinda Cooper took over the editorial role midway through the project; she did so with great aplomb and efficiency. Dr Todd Foglesong provided helpful editorial support and intellectual guidance to the project, especially during its early stages.

A very special word of thanks is due to Yonko Grozev who co-managed the project with me from its inception in 2003. An accomplished human rights lawyer, Yonko generously and untiringly gave of his time to help manage a complex project involving multiple authors and advisory board members spread across almost a dozen countries. He also found the time to author the Bulgaria report and take the lead in an ambitious advocacy effort to promote prosecutorial reform in Bulgaria.

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Martin Schönteich

New York, July 2008

## Foreword

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This book is the culmination of a project spanning almost six years. As initially conceived, the project sought to encourage and support vibrant debate on prosecutorial reform in Bulgaria. During the intervening years the project's mandate grew to inform a broader, global audience of reformers interested in promoting prosecutorial accountability, independence, and effectiveness. Given the expansion of the project's goals, it is instructive to provide a brief history of this ambitious undertaking.

Bulgaria's first post-communist Constitution, which came into force in 1991, recognized the principle of the separation of powers between the executive, legislative, and judicial branches of the state. Judges, prosecutors, and criminal investigators became part of the judiciary and were given equal status by the Constitution. This was motivated by a desire to afford the prosecution service a high degree of independence and to prevent executive meddling in the work of the country's prosecutors. By focusing on guaranteeing prosecutorial independence, the authors of the Constitution neglected to ensure adequate accountability and oversight mechanisms for the prosecution service.

Within a few years of the promulgation of the new Constitution, the decision to elevate prosecutorial independence over accountability proved to be flawed. Evidence of the abuse of power within the Bulgarian prosecution service mounted. Despite widespread corruption in government, very few legislators and government officials were prosecuted. Expectations that partisan political considerations would not play a role in prosecutorial decision making were proved wrong. As a result of ineffective oversight mechanisms the abuse of power by the prosecution service went unsanctioned. This generated considerable public mistrust in the ability of the justice system and the prosecution service to effectively combat crime; in particular corruption within the higher echelons of government.

By the late 1990s, there were widespread calls for the reform of the Bulgarian prosecution service. The reformers were hampered by a lack of consensus on the details of the reform—what legal, institutional, and practical changes were necessary to establish an accountable prosecution service. Moreover, many reformers had limited comparative knowledge about the operations of criminal justice systems and prosecution services in other countries.

Sensing a political opening for reform, and a belief that prosecutorial reform was necessary to further the creation of an open society, the Open Society Foundation-Sofia (OSF-Sofia) launched a project in 2002 to promote informed debate on prosecutorial reform in Bulgaria. Shortly thereafter, the Open Society Justice Initiative, an operational program of the Open Society Institute (OSI), joined forces with OSF-Sofia. The joint project set out to undertake comparative institutional and legal research on prosecution services in a variety of countries. The objective was to document

good legal and institutional “practices” which foster prosecutorial transparency and accountability.

In April 2003, the project suffered a setback when the Bulgarian Constitutional Court delivered a ruling which substantially limited the legislature’s ability to reform the prosecution service. The court ruled that any constitutional changes to the structure of the judiciary, including the prosecution service, could be adopted only by a Grand National Assembly. A Grand National Assembly consists of 400 deputies (as opposed to 240 in the ordinary National Assembly) specifically convened in order for matters of national importance to be resolved, such as adopting a constitutional amendment.

The 2003 Constitutional Court ruling meant that significant prosecutorial reform could no longer be achieved in Bulgaria within the timeframe the project had hoped for. The ruling, and the Justice Initiative’s growing interest in promoting prosecutorial reform in other parts of the world, resulted in an expansion of the project’s parameters and timeline. The revised project no longer confined its mandate to promoting prosecutorial reform in Bulgaria. Instead, it sought to explore at a global level how best to balance prosecutorial accountability with independence whilst promoting prosecutorial effectiveness. Two prosecution services from the Global South—Chile and South Africa—were added to the comparative research project.

The nine countries reviewed in this volume represent a broad range of experience and approaches about the manner in which prosecution services can be organized, including both common law and civil law systems, developed and developing states, high and low-crime countries, unitary and federal legal systems, as well as established and transitional democracies. A focus of this volume is on the lessons offered by prosecutorial reform in democratic states, and the challenges democratic (and democratizing) states face in designing prosecutorial services.

The methodology employed by the project focuses the debate about the organization of prosecution services on purposive reforms that improve the capacity, competence, independence, and accountability of the prosecution as an institution to achieve specific social aims. The project recruited local scholars and researchers—often senior prosecutors or erstwhile prosecutors—to provide first-hand accounts of the practices of the prosecution services in their countries. The country reports contained in this volume have consequently been prepared by persons familiar with the domestic workings of the prosecution service in each country.

The authors of the country reports were asked to focus on actual practice, rather than formal rules. Many prosecution services have good formal rules based on international standards and norms. In practice, however, such rules are often ignored. The country authors were further encouraged to move beyond description to analysis and evaluation. We wanted to know what really happened within selected national prosecution services, why, and to what effect. By addressing these questions it is hoped that the reports will assist policymakers, who are considering the organization or reform of a prosecution service, anticipate what the likely actual effects of formal rules and regulations may be.



The country reports show that there is unlikely to be a universal model of prosecutorial independence and accountability. The forms which independence and accountability take vary greatly between states. As a result, reformers have a wide array of models to choose from. Reformers should, however, recognize an important finding of the comparative research presented in this book: piecemeal reforms are not easily transportable between justice systems or countries. Reformers should avoid importing a seemingly successful element of a reform—an innovative institutional mechanism or a new regulation, for example—directly from a country with a successful prosecutorial model. This should be done only once the broader context of the reform in which such an element plays a part is properly understood. As Timothy Waters points out in the overview chapter:

*One of the core comparative lessons is that different constitutional, institutional, and functional structures must be considered comprehensively, not in isolation, to understand their operation and effects in a given social and political context. A single element in isolation—or introduced in a reform, for example—may have very different effects if the totality of relevant, interrelated elements is not in place as well.*

It is hoped that this book will assist the reader to better identify and understand good practices in terms of prosecutorial accountability, independence, and effectiveness. It should also serve as a useful reference for anyone interested in prosecutorial reform, including policy makers, senior prosecutors, academics, and civil society leaders. Moreover, the book should guide and enrich national debates on prosecutorial reform, especially in countries—such as Bulgaria—which have recently transitioned to democracy.

Martin Schönteich

Senior Legal Officer: National Criminal Justice Reform  
Open Society Justice Initiative  
July 2008



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# Overview: Design and Reform of Public Prosecution Services

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Timothy Waters



## A. Introduction

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### I. Purpose of the Project

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This Overview and the accompanying Reports survey the structure, institutional relationships, working methods, and performance of prosecution services in nine countries,<sup>1</sup> focusing on actual practice as well as formal rules. The Overview and Reports focus debate about the organization of prosecution services on purposive reforms that improve the capacity, competence, independence, and accountability of the prosecution as an institution designed to achieve specific social aims. This necessarily means acknowledging that a prosecution service is an institutional actor embedded in a political process—it is not an isolated, insulated element removed from politics—and should be evaluated by its *de facto* relationship with other political and social actors.

This need not and does not mean that prosecutors ought to be “political” in any conventional sense. Indeed, as noted below, one of the few clear points of universal practice is that for the most part prosecutors properly ought to be neutral<sup>2</sup> or non-political in their decision-making.<sup>3</sup> Yet this commitment to neutrality should not blind reformers to the political nature of the processes within which a prosecution service—or for that matter a judiciary—operates. Budgeting decisions, appointment and disciplinary proceedings, and legislation organizing prosecution services or de-

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1 Bulgaria, Chile, England and Wales, France, Germany, Hungary, Italy, South Africa, and the United States of America. Reference in this Overview to the specific circumstances in each country is generally made without citation; full citation is included in the accompanying country-specific Reports.

2 This Overview generally refers to prosecutors’ “neutrality” rather than their “impartiality,” but these terms should be read as being functionally equivalent. In certain systems, “impartiality” is supposed to be a quality of judges, and it might be confusing to suggest that prosecutors ought to demonstrate a quintessentially judicial quality. However, those characteristics represented by the judicial norm of impartiality are only antithetical to the role of a prosecutor if one considers prosecutors to be ‘partisans’ of the government. Prosecutors ought to pursue particular arguments and outcomes because they comport with externally defined values, not because they are the views of a particular party. (Likewise, a judge is not partial simply because he ultimately rules in favor of one party, or even because, in so doing, he is following externally defined values, such as the rules formulated by the legislature.) This is most clearly captured in systems, such as Germany, in which the prosecutor is explicitly identified as a guardian of legality, but even in strongly adversarial systems prosecutors (and defense attorneys) have obligations to the court and to the truth. Several international standards—issued by the United Nations, Council of Europe and the International Association of Prosecutors, for example—refer variously to prosecutors’ obligations in regard to “impartial” investigation, for example, or the obligation for prosecutions to perform their duties without favor or prejudice, or more generally in connection with the functioning of the criminal justice system.

3 Indeed, all actors in the governing process, including elected figures, have obligations not to act arbitrarily, or to use their powers for personal gain; thus even the exercise of expressly political power does not entail *unrestrained* partial or partisan activity.

fining their powers are all political processes that involve other, explicitly political actors.<sup>4</sup> The need for prosecution services to account for their use of public resources itself implies involvement in a politically mediated process. Where prosecution services have a formal or informal role in crime reduction and public safety, their charging decisions are necessarily related to a broader set of political and social considerations. Even the expectation that prosecution services will act neutrally logically implies some means of defining, monitoring, and ensuring that neutrality, which entails accountability to other institutional actors. Indeed, it may be that only by understanding and engaging with those political processes can a meaningful neutrality be maintained, or a reasoned evaluation of and debate about prosecutorial reform be conducted.

A key element in such evaluation is the prosecution's ability to accomplish legitimate, publicly desirable goals and objectives, while effectively resisting improper interferences. Accordingly, in a very broad sense, effectiveness means the ability of the prosecution to meet legitimate public objectives.<sup>5</sup> This implies two things. First, the evaluation of a prosecution service requires assessment of society's aims for that service, which may differ from country to country and may change over time.

Second, evaluation ought to focus on pragmatic effects, rather than formal design. In considering the organization or reform of a prosecution service, policymakers need to ask what the actual effects of statutes and regulations are—do they make prosecutors effective or not in achieving the specific social aims they have been assigned? Do they make prosecutors accountable in ways they should be and independent in ways they must be? If not, what alternatives might work in the broader legal and political context of the country? This Overview and its accompanying Reports aim both to apply that approach and in so doing demonstrate its effective potential for policymakers interested in prosecutorial reform.

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4 These Reports occasionally refer to “the political branches,” meaning the executive and legislature, and in context the civil service inasmuch as its senior ranks are politically appointed. See European Union Accession Monitoring Program [EUMAP], *Monitoring the European Union Accession Process: Judicial Independence*, Budapest: Open Society Institute, 2001, at 17, footnote 3.

5 That is, goals which are determined through a legitimated and authoritative process of deliberation consistent with the decisional norms of that society, and, more broadly, goals which are commonly or informally agreed or understood. (A common example is responsibility for reducing crime: in some states, the prosecution service has no formal role in reducing crime, but it is a rare prosecution service that, in practice, is utterly indifferent to or unaffected by trends in criminality.) “Meeting public objectives” should not be understood as a referring to the prosecution service's popularity.

## II. Project Structure and Methodology

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In the last twenty years there have been significant changes in criminal procedure and in public prosecution in many parts of the world; this project aims, in part, to examine some important instances and examples of that trend. The nine countries<sup>6</sup> reviewed in this Overview represent a broad range of historical and contemporary experience and approaches to the question of how to organize a prosecution service, including both common law and civil law systems, as well as both long-established and transitional democracies.<sup>7</sup>

The Reports on which this Overview is based were prepared by reporters familiar with the domestic workings of the prosecution service in each country, and then reviewed and edited in a collaborative process by an advisory board of internationally recognized experts<sup>8</sup> and consultants for the Open Society Justice Initiative to ensure their functional comparability while retaining perspectives relevant to each country. Each reporter worked from a common methodology developed by the Justice Initiative in consultation with the project's advisory board and administration and the reporters themselves.<sup>9</sup>

The Reports and Overview do not constitute a strictly “scientific” analysis of the nine systems in question, nor are their results directly translatable to other systems. However, the common methodology does allow meaningful consideration of which structures and practices achieve which results, across a reasonably wide range of social and political conditions, such that the findings provide a useful, generative framework for designing prosecutorial reform.

The next section of this Overview, Section B, synthesizes the individual country Reports into general comments concerning the organization and reform of prosecution services within their broader political and institutional context.

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6 In this Overview, “state” generally refers to the country-level entity; for federal states, like Germany and the United States, “state” may refer, in context, to the sub-federal units (the German *Länder*, for example), while the country-level entity will be referred to as the “State” in majuscule, or the “federal” level.

7 All of the societies examined have solidly democratic institutions. There may be no *theoretical* reason why an effective, neutral, and accountable prosecution service could not function in a non-democratic state, and indeed, valuable lessons might well be gained by comparative study including such countries. Consistent with the broader commitments of the Open Society Justice Initiative, however, the Overview and Reports focus on the specific lessons offered by prosecutorial reform in democratic states, and the challenges that face democratic states in particular in designing prosecution services.

8 The advisory board included Károly Bárd, Central European University; Giuseppe Di Federico, Research Institute on Judicial Systems, Bologna; Barry Hancock, International Association of Prosecutors; Joachim Herrmann, University of Augsburg; Cristián Riego, CEJA-Chile; and Ekaterina Trendafilova, International Criminal Court.

9 This Overview was prepared by a consultant involved in the design and editing of the Reports, and draws its conclusions principally from the data and evidence produced for the Reports.

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## ***B. Findings: Policy and Practice in the Design of Prosecution Services***

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The following sub-sections of this Overview examine particular aspects of the design and reform of prosecution services, in light of the evidence from the nine countries surveyed. These sub-sections examine: general issues of independence and accountability (I.); the structure and organization of public prosecution services (II.); functions and powers of prosecutors (III.); the relationship of the public prosecution service to other organs of the state (IV.); information control concerning the prosecution service's activity (V.); and the use of statistics (VI.). Each section begins with a summary in italics that highlights the main issues and findings.

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### **I. General Issues**

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*This section considers the proper measure of independence and accountability a prosecution service should be afforded, and the best ways to ensure that the service effectively and efficiently fulfills the purposes it serves in society. All prosecution services are a society's principal means of pursuing punishment of criminal behavior and its interface with the adjudicative power. A prosecution service must be able to provide neutral, non-political, non-arbitrary decision-making about the application of criminal law and policy to real cases.*

*Prosecutorial independence is thus not an absolute quality; it is a means of ensuring that the prosecution service performs those tasks society assigns to it. Yet analysis seldom considers whether or not the prosecution service is effective or efficient; performance measurement, especially statistical evaluation, tends to focus on quantitative processes without attending to the outcomes that actually affect individuals and society.*

*There is no single model for a prosecution service, and each must be evaluated in context. Many configurations are consistent with international standards, and the choice among them is political and constitutional; it is negotiable. Recognizing the availability of various models does not imply a casual or "cafeteria" approach to reform, but rather deliberation about the interrelatedness of different design elements, which must be evaluated in their full historical, social, and political context; proposals for reform must consider their complex interactions.*



### 1.1. Independence, neutrality, and accountability

There is very little theoretical, academic, political, or practical discussion about the meaning of prosecutorial independence. In most Western European countries the institutional dependence of prosecutors on the executive branch is the accepted status quo. At the same time, recognition of the problems related to prosecutorial dependence upon the executive branch is growing, and there is a trend towards increasing the independence of prosecution services from the executive; this is especially evident in the transitional democracies of Central Europe and Latin America.<sup>10</sup>

Although some models posit an analogy between judicial and prosecutorial independence, the independence afforded to (or required by) a prosecution service or individual prosecutors usually differs considerably from that of the judiciary or individual judges, due to their different purposes and functions. Although in some systems prosecutors are afforded status and independence similar to that of judges,<sup>11</sup> this is not necessary for a properly functioning prosecutorial system; indeed, systems which entirely subordinate individual prosecutors to a centralized and hierarchical decision-making process,<sup>12</sup> or even to the political process directly,<sup>13</sup> nonetheless maintain a measure of decisional independence and function effectively.

In many countries in transition, the independence of judicial and prosecutorial authorities is seen as an integral part of the broader transition from authoritarianism to open, democratic societies.<sup>14</sup> Yet this foundational, constitutional function is not the only, or even necessarily the primary purpose of a prosecution service, because of course societies create prosecution services first and foremost to punish and control crime, or otherwise ensure the legality of public and private behavior, not to vindicate democratic institutions.<sup>15</sup> In Chile, for example, reform of the criminal justice system—although sweeping in its own right—has not been seen only or even principally as part of the broader political transition from military rule; this separation of

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10 For example, the 1991 reforms in Bulgaria that afforded the prosecution service a high level of autonomy were designed to protect the public from politically motivated prosecutions and guarantee to the service the freedom to prosecute persons in power. Robust accountability mechanisms were not incorporated into the reforms; the largely unchallenged assumption of reformers was that once the service and individual prosecutors were afforded autonomy, they would not be influenced by improper political considerations.

11 As in Bulgaria and France, where prosecutors and judges are considered members of the Magistracy.

12 As in Germany or Hungary, where prosecutorial office heads hold considerable authority over the line prosecutors subordinated to them.

13 As in the United States, which holds direct elections for most District Attorneys at the county level, and subordinates federal Attorneys to a politically appointed Attorney General answerable to the President.

14 Cf. Council of Europe Committee of Ministers Recommendation 19/2000 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system (*adopted* Oct. 6, 2000), Explanatory Memorandum (General Considerations)(*see* Sec. 1.4, below)(referring to “practical objectives to be attained in pursuit of the institutional balance upon which democracy and the rule of law in Europe largely depend[]”).

15 This can be seen in the fact that even non-democratic societies have police, investigation, prosecution, and adjudication functions—often very effective ones.

criminal justice reform and restorative justice efforts contrasts sharply with the transitions in Central and Eastern Europe and South Africa, where justice-sector reform has been part of the transformation of the state and is suffused with the politics of transitional justice.<sup>16</sup> In these states, reconciliation, reparations, and the affirmation of justice coincided with efforts to establish the rule of law, independence of the judiciary (and often of the prosecution service), and democratic institutions of the state, but the example of Chile shows that this is not a necessary relationship.

The experience of the countries surveyed shows, therefore, that no particular model of independence and accountability is necessary.<sup>17</sup> One of the core comparative lessons is that different constitutional, institutional, and functional structures must be considered comprehensively, not in isolation, to understand their operation and effects in a given social and political context. A single element in isolation—or introduced in a reform, for example—may have very different effects if the totality of relevant, interrelated elements is not in place as well.

What then, if anything, is the essential quantum of independence for a prosecution service? By the same token, what measure of accountability to society or political actors is irreducibly necessary? Review of international standards<sup>18</sup> and state practice shows that a prosecution service must be able to provide *neutral, non-political, non-arbitrary decision-making* about the application of criminal law and policy to real cases.<sup>19</sup> To ensure this, the *institutional* decisional independence of the entire

16 In South Africa, for example, this process involved, among many other reforms, the nearly simultaneous introduction of majoritarian democracy and a system of separated powers that dramatically reduced executive supervision of the prosecution service, the dismantling of apartheid-era laws (and the consequent introduction of previously excluded communities into the prosecution service's workforce), the dramatic expansion of defined constitutional rights, and creation of the Truth and Reconciliation Commission process, which required the prosecution service to accommodate a system of amnesties for politically motivated crimes from the apartheid era. Many of these elements, including the status of the National Prosecuting Authority, were defined in the new constitution and seen as integral elements of the broader project of reforming the state.

17 Independence and accountability are not contradictory elements, but complementary ones. Indeed, they may be thought of as expressing two ends of a continuum from total autonomy to total hierarchical subordination in the decision-making process. Cf. EUMAP, *Monitoring the EU Accession Process: Judicial Independence*, Budapest: Open Society Institute, 2001, at 18 (making this argument in connection with judges' independence and accountability). No system occupies either extreme; all combine various elements of independence and accountability.

18 See Section 1.4, below.

19 See, e.g., International Association of Prosecutors, *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, adopted Apr. 23, 1999, at <http://www.iap.nl.com/> (see Sec. 1.4., below), St. 3 ("Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall: carry out their functions impartially; remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest; act with objectivity[]"). The role is related to the traditional European function of the prosecution as the "guardian of legality" within the state, a role driven by the gradual ascent of the rule of law as fundamental principle of governance. The conceptual legacy of this role for the enforcement of the criminal law is still very much alive, in that the fundamental task of the prosecution is not so much to represent the State in all its power, but rather to ensure public order and legality—a fundamentally apolitical (or at least non-partisan) role. The prosecution ideally is a symbol of justice in a system based on the rule of law.

prosecution service appears to be more important than the independence of the individual prosecutor.<sup>20</sup>

The practical check on prosecutorial decision-making is the judiciary itself—or, in functional terms, there is a division of social response to criminality between a prosecution that initiates and pursues, and a judiciary that decides.<sup>21</sup> It is *combination* of initiating and adjudicating functions in a single institutional or individual actor that almost always violates norms of independence, and almost always results in either ineffective response to criminality or over-response.<sup>22</sup>

It follows from this that the judiciary—because it provides the final or effective check<sup>23</sup>—is generally better positioned to ensure against abuse of liberty, and for that reason is more in need of independence. It follows too that the prosecution—because its role is to initiate, not decide—does not necessarily have to be as independent, although it can be. So long as the judiciary is independent, the risks from political interference with prosecutions probably run more towards improperly failing to pursue crimes than the wrongful pursuit of false and persecutory charges.

Unfortunately, the risks that arise from non-investigation or non-prosecution are more difficult for the judiciary to check. Political actors can perceive advantage in

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20 It is instructive to compare this with the independence afforded judges and the judiciary. Indeed, although the individual *judge's* independence is widely considered an essential ingredient of a free society, it may well be that the *judiciary's* institutional independence is actually more important—or at least that more expansive definitions of individual judicial independence, which resist any form of instruction or remand by higher judges, are probably unnecessarily (that is, redundantly) protective of society's interest in avoiding external influence on judicial decisions. See EUMAP, *Monitoring the EU Accession Process: Judicial Independence*, Budapest: Open Society Institute, 2001.

21 Judges are generally expected to be *non-initiating* agents who adjudicate disputes submitted by conflicting parties, assuring to each party an equal chance to present the arguments in their favor; a judge's legitimacy depends on being and appearing impartial and independent in his role. (This is true of both civil law and common law judges, who, despite their differing social status, power in the courtroom, and level of involvement in proceedings, normally do not initiate disputes. Obviously, this observation does not apply to investigative judges, but then that is precisely why systems employing investigative judges separate their functions from the sitting judge at trial.) Prosecutors, on the other hand, are expected to be active agents who initiate and conduct criminal proceedings, direct the police during the investigations and act as parties to judicial proceeding; a prosecutor is not supposed to be passive or neutral in the judicial process. See G. Di Federico, *Independence and accountability of the judiciary in Italy. The experience of a former transitional country in a comparative perspective* (paper presented at the 9<sup>th</sup> Annual Conference on "The Individual vs the State," Central European University, Budapest, May 4-5, 2001), in A. Sajó (ed.), *Institutional Independence and Integrity*, The Hague: Kluwer International (forthcoming). From this it follows that prosecutorial neutrality does not mean indifference to social or policy preferences or outcomes; rather, prosecutors are supposed to be guided by preferences determined in some other (political) process, and so long as they act consistently with those preferences (that is, with defined social policies, expressed in legal authorizations), they are said to be acting neutrally.

22 An example might be the growth in the phenomenon of plea bargaining in the United States, which according to some views, affords prosecutors extraordinary practical power to define not only charges but outcomes, given the tremendous leverage and bargaining power that sentencing ranges afford them in compelling rationally motivated suspects to plead guilty to lesser charges in order to avoid the risk of a catastrophically long sentence at trial; judges' involvement in this process is largely formal and residual.

23 The true ultimate check on prosecutorial activity is constitutional and political—the capacity of the broader political community to intervene in and alter the terms of the prosecutorial enterprise.

encouraging investigations even if they will ultimately fail to pass muster with an independent judiciary. Investigation and prosecution can last for years, considerably inconveniencing and intimidating their targets, without ever reaching a stage at which the judiciary can effectively intervene—and when it finally does, the costs may be relatively low, as even an independent, active, and powerful judiciary may not prove particularly effective at policing abuse of prosecutorial discretion. Criminal investigation often is, *de facto*, a sanction in itself, which may continue for years before any judicial review.<sup>24</sup> At the opposite end of the spectrum, a prosecutor's discretionary decision not to proceed with a prosecution can provide valuable cover for powerful actors, both outside and inside government; an independent judiciary can check unjust prosecution, but it cannot effectively force the investigation or prosecution of crimes.<sup>25</sup>

The level of independence prosecutors are afforded, or the degree of accountability to which they are subjected, is therefore not an absolute quality they can be adduced in the abstract; it is rather a means of ensuring that the prosecution service performs those socially valuable tasks we assign to it.<sup>26</sup> (One of those purposes, especially in a democracy, is to provide protection against politically motivated use of the criminal law and justice system, which can be ensured by an independent judiciary *and* prosecution service.)

Yet even though this independence is contingent and instrumental, experience suggests that it is detrimental to the maintenance of a balance between independence

24 There are particularly egregious examples of extended and unjustified investigation in Italy, where prosecutors have a very high level of independence and a formal constitutional obligation to investigate all possible criminality. See, e.g., Delfo Del Bino, *Il caso massoneria, un decennio di politica, giustizia e democrazia* (2001) (discussing a massive, nine-year investigation of Freemasons ordered by a single prosecutor).

25 Cf. James Vorenberg, "Decent Restraint of Prosecutorial Discretion," 94 *Harvard Law Review* 1523 (1981) ("[T]he existence of trials cannot check prosecutorial powers not dependent on trial. These powers include the prosecutor's wide discretion in making decisions about charging . . . and allocating investigative resources."); Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry*, 1969, at 22 ("[T]he power not to prosecute may be of greater magnitude than the power to prosecute, and it certainly is much more abused because it is so little checked."); Timothy William Waters, "Unexploded Bomb: Voice, Silence, and Consequence at the Hague Tribunals—A Legal and Rhetorical Critique," 35 *New York University Journal of International Law and Politics* 1025 ("One power the [ICTY] Prosecution possesses is the ability to decide whether or not to proceed to court"). In some systems there are limited and highly formalistic opportunities to intervene in prosecutorial decisions about charging. For example, in the German system, a victim may appeal to the state Supreme Court to require the prosecutor to bring a case to trial (*Klageerzwingungsverfahren*). However, this possibility is available only if the case has been dropped for lack of evidence, not because of a prosecutor's discretionary determination that there is no public interest in prosecution. Since it has become common for prosecutors to drop cases for the latter reasons, in practice little control exists on prosecutorial discretion to drop charges. In any event, such appeals are rare and courts seldom grant them.

26 To the degree a system assigns its prosecution services any of the decisional functions of judges, it should also afford them a level of independence commensurate with that afforded judges, which although not absolute—judicial independence is itself instrumental of social interests—must nonetheless be considerable, and must extend to all aspects of the core decisional process. This set of functions may change over time; in many countries the decision on pre-trial detention was not considered a judicial decision, but today it has become self-evident that only judges should authorize deprivation of liberty for all but brief periods of time.

and accountability, and to the underlying social purposes, if that balance is altered too frequently or in an *ad hoc* manner (either for partisan gain or to achieve a particular outcome in a particular case); the legitimate purposes society may assign a prosecution service are broadly defined, not tailored to short-term political outcomes.<sup>27</sup> To be clear: while such micro-managing is harmful to prosecutorial independence, it is only a concern to the degree it impinges on other values, such as neutral, non-political criminal prosecution, equal application of the law, or effective realization of other tasks assigned to the prosecution service; independence for the prosecution is not an end unto itself, but a contingent social commitment designed to create an effective and efficient service.

## 1.2. Effectiveness and efficiency

*Purposes of a Prosecution Service:* Effectiveness is first a function of purpose; without a clear sense of what purposes a prosecution service is supposed to serve, it is definitionally impossible to say how effective it is.

Surveying the countries considered in these Reports, prosecution services have some or all of the following social purposes:<sup>28</sup>

- ▶ Pursuing criminal charges, including initiation (though they may share this with police or other investigative authorities), prosecution—that is, pursuit of the interests of the state or particular parties in court—and enforcement;
- ▶ Contributing generally to public order and implementation of society's criminal policy;
- ▶ Ensuring the legality of administrative, political, and fiduciary activity, as well as the actions of individuals;
- ▶ Representing state social, or individual interests in civil claims; and
- ▶ Representing the interests of legally incompetent persons.

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27 The Hungarian experience, for example, shows that if the only channel through which prosecutorial conduct can be influenced is legislation, frequent interventions will make the legal system too rigid, since legislation can only react to any individual decision with a general rule.

28 Cf. Council of Europe Committee of Ministers Recommendation 19/2000 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system (*adopted* Oct. 6, 2000)(see Sec. 1.4., below), Recs. 2-3:

2. In all criminal justice systems, public prosecutors:
  - decide whether to initiate or continue prosecutions;
  - conduct prosecutions before the courts;
  - may appeal or conduct appeals concerning all or some court decisions.
3. In certain criminal justice systems, public prosecutors also:
  - implement national crime policy while adapting it, where appropriate, to regional and local circumstances;
  - conduct, direct or supervise investigations;
  - ensure that victims are effectively assisted;
  - decide on alternatives to prosecution;
  - supervise the execution of court decisions. . . .

In general, these purposes involve representing society's interest in *initiating* and *pursuing* legal resolutions to social problems, but not *adjudicating* those problems. The social interest in achieving final determinations concerning criminal actions, violence, harm to social peace, or justice rest with the judiciary.

All prosecution services serve as society's principal means of pursuing punishment of criminal behavior, along with the police and the judiciary, and as its principal interface with the adjudicative power.<sup>29</sup>

*Effective and Efficient Pursuit of Purposes:* Effectiveness simply measures whether or not the prosecution service is achieving the goals society has set for it. Does the work of the prosecution service punish enough criminals? Does it reduce crime? Does it represent the interests of specific parties? Does it contribute to greater legal certainty?

Efficiency differs from effectiveness in its measure of costs. A measure which is effective achieves its stated goal, but without reference to the costs; a measure which is efficient achieves its goal at an acceptable cost, or at lower cost than alternatives. Efficiency therefore measures whether or not the prosecution is achieving the goals society has set for it within some framework of costs, monetary or other. Does the prosecution service achieve its goals within budget? Does it discover and punish criminals without catching up the innocent? In representing some parties' interests, does it under-represent other parties' interests? Does it achieve legal certainty without sacrificing flexibility or harming important interests and rights?

If analysis seldom considers whether or not prosecutors are effective, it even more rarely considers if they are efficient, and they rarely figure in policy planning or statistical measurement. Yet each of these parameters is important and useful. Without clear purposes and mechanisms for measuring performance towards those purposes, there is no way for society to know if the prosecution is contributing towards a better society, however defined; without also considering the costs of its contribution, there is no way for society to know if it is making a worthwhile investment in the prosecution service, or the criminal justice system more broadly, or if it should consider different strategies that would cost less or yield more.<sup>30</sup>

Effectiveness and efficiency allow us to recognize more clearly the instrumental nature of independence and accountability mechanisms, rather than treating them as shibboleths or as absolute—and thus non-negotiable—prerequisites of a free society.

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29 The recently adopted mission statement of South Africa's National Prosecuting Authority typifies the most common foci of a prosecution service—prosecution, crime control, legality: "Guided by the Constitution, we in the National Prosecuting Authority ensure justice for the victims of crime by prosecuting without fear, favor or prejudice, and by working with our partners and the public to solve and prevent crime." *Annual Report 2005/06*, National Prosecuting Authority, 2007, at 9 (noting also that crime prevention—a new formal role for the prosecution service—will be achieved by adopting a problem-solving approach to crime, enhancing prosecutors' role in guiding investigations, applying case-flow management principles, and engaging in joint problem-solving with other stakeholders).

30 If limiting costs is conceived of as a secondary purpose of a given institutional or functional arrangement, then an effective measure and an efficient one become practically identical.



This does not in any way imply a lesser commitment to these values.<sup>31</sup> On the contrary: properly understood, the efficiencies and social goods produced by a sufficiently independent and accountable prosecutor should actually increase social commitment to independence and accountability.

### 1.3. Measuring performance

Even if the purposes are clearly agreed upon and costs estimated, measuring the prosecution service's success in meeting those purposes, and the price of its doing so, requires creative and sophisticated metrics that focus as much on qualitative outcomes as they do on numbers or points in the process. Yet present performance measurement, especially statistical evaluation, tends to focus on quantitative processes without attending to the outcomes that actually affect individuals and society.<sup>32</sup>

Some current measurements, to be sure, do exhibit attention to outcomes: drops in crime rates, for example, directly measure a phenomenon of significance to individuals and the whole community.<sup>33</sup> But many of the internal measurements commonly used by prosecution services to evaluate themselves (and to justify their operations and budgets before the legislature or the executive) focus on quantitative processing with little real-life relevance. An increase in the number of cases filed per attorney, for example, may bespeak a busier office, but does not tell us if this reflects a rise in efficiency, a rise in the rate of crime reporting, or a rise in the crime rate itself, or even some combination of these; it does not tell us if those attorneys are overworked. Internal processing measurements, alone, tell us little about the outcomes of the prosecutorial enterprise, which are ultimately the justification for social support of a professional prosecution service.

Thus orienting measurement and evaluation towards public policy standards—meaning a focus on outcomes of direct interest to the final beneficiaries, who are the citizenry, rather than intra- or inter-institutional standards—can be a useful means of ascertaining the prosecution service's performance. Possible criteria for such public policy-oriented measurement could be drawn from work done with trial judges in the United States, where the following criteria were identified: access to justice; expeditiousness and timeliness; equality, fairness, and integrity; independence and accountability; and public trust and confidence.<sup>34</sup> These are admittedly very broad measures (and some are measures of perceptions), but their direction is towards qualitative measures of outcomes which are of real consequence to the public.

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31 Obviously, effectiveness and efficiency are not values unto themselves, but are measures of how well one vindicates other, underlying values, such as the protection of individual rights, human dignity, or the security and well-being of the community.

32 Cf. *Access to Justice: The Prosecution Service*, United Nations Office on Drugs and Crime, Vienna, 2006, at 3-4 (outlining standards and questions for assessing prosecution services's statistics).

33 The existence of a causal relationship between prosecution of crime and crime levels is controversial; the example is raised here for purposes of illustration only.

34 National Center for State Courts Commission on Trial Court Performance Standards, *Trial Court Performance Standard Project* (1987).

In addition to facilitating other political or institutional actors' efforts to ensure and support the prosecution service's effective and efficient operation, public policy evaluation can itself be a potent form of accountability. In some contexts, it can be more powerful, as an analytical and evaluative tool, than measuring the performance of the prosecution against a set of constitutional arrangements or procedural benchmarks.

#### 1.4. International standards

Another aid to conceptualizing the purposes of a prosecution service and measuring its performance is the limited number of international standards concerning prosecutorial independence, accountability, and organization. For example, the UN Guidelines and Council of Europe Recommendations on the role of public prosecution include suggestions for how to structure relationships between governments, courts, legislatures, police, and prosecution services, and how to encourage neutrality and fairness in the administration of criminal justice. These guidelines and recommendations are both convenient and compelling, backed by recognized regional and international bodies and representative professional organizations. They are, however, very general.

*UN Guidelines:* The United Nations Guidelines on the Role of Prosecutors of 1990<sup>35</sup> contain 18 articles addressing the qualifications, career path, and service conditions of prosecutors, as well as their role in criminal proceedings. The UN Guidelines are both extremely general and non-binding, but precisely for these reasons they may indicate the broadest range of acceptable practice: practices that unambiguously contradict the Guidelines would probably not describe a meaningfully effective, neutral, and accountable prosecution service, even if, as a formal matter, such practices might not clearly violate any binding legal obligation.

*Council of Europe Recommendations:* The Council of Europe's Recommendation 19/2000<sup>36</sup> contains 39 recommendations concerning the organization, powers, rights, and duties of public prosecutors. The Recommendations are somewhat more detailed than the UN Guidelines and aim at "identify[ing] the major guiding principles. . .that ought to govern" public prosecution services given the existence of two separate systems in Europe.<sup>37</sup> The Recommendations naturally relate only to Council members,<sup>38</sup>

35 United Nations Guidelines on the Role of Prosecutors (*adopted by Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Aug. 27-Sept. 7, 1990*), U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990), at <http://www1.umn.edu/humanrts/instree/i4grp.htm>.

36 Council of Europe Committee of Ministers Recommendation 19/2000 [Rec. 2000/19] of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system (*adopted Oct. 6, 2000*).

37 Council of Europe Rec. 2000/19, Explanatory Memorandum (General Considerations) ("The committee . . . took a dynamic approach and set out to identify the major guiding principles—common to both types of system [i.e. the civil and common law]—that ought to govern Public Prosecution as it moves into a new millennium. At the same time it sought to recommend practical objectives to be attained in pursuit of the institutional balance upon which democracy and the rule of law in Europe largely depend[.]").

38 The Recommendations clearly have no formal relationship to the prosecution services of Chile,



and are likewise non-binding, but may be considered indicative of possible or advisable practice for other states. The Recommendations also include an extensive explanatory memorandum.<sup>39</sup>

*International tribunals' standards and ICC code of conduct:* The prosecutorial standards of the International Criminal Tribunal for the Former Yugoslavia,<sup>40</sup> and the draft code of professional conduct for prosecutors of the International Criminal Court,<sup>41</sup> are only narrowly applicable to the prosecutors of the Tribunal and Court respectively. Yet precisely because they are instruments for international institutions, they likely rely upon and are fully consistent with the practice of the principal legal systems, and thus constitute contemporary expressions of standards that, by their nature and design, represent and are declarative of a shared minimum.

*IAP standards:* The International Association of Prosecutors has issued a set of Standards of Professional Responsibility,<sup>42</sup> intended as "a working document for use by prosecution services to develop and reinforce their own standards."<sup>43</sup> The IAP Standards address prosecutors' professional conduct, independence, neutrality, professional role, obligations towards other organs of the state, and rights to protection in their professional capacity.

The IAP Standards are a private and non-binding initiative, and understandably address the perspective of prosecutors rather more than that of other institutional actors, but they may reasonably be said to represent "standards and principles which are generally recognised internationally as necessary for the proper and independent prosecution of offences."<sup>44</sup>

*ABA standards:* The American Bar Association has developed a series of standards for the prosecutorial function,<sup>45</sup> as well as an international Prosecutorial Reform Index which draws on them. The 42 standards cover the full range of actions, powers, obligations, and institutional relationships affecting prosecutors and prosecution services.

The ABA's Standards reflect an American perspective, and obviously have no authority outside the particular context of the United States. Nonetheless, they represent a

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South Africa, and the United States, which are not members of the Council of Europe.

39 See [http://www.coe.int/T/E/Legal\\_affairs/Legal\\_co-operation/Conferences\\_and\\_high-level\\_meetings/European\\_Public\\_Prosecutors/Rec%20\(2000\)%2019%20E%20PR%20Expl%20Memo.asp](http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Conferences_and_high-level_meetings/European_Public_Prosecutors/Rec%20(2000)%2019%20E%20PR%20Expl%20Memo.asp).

40 Registrar of the International Criminal Tribunal for the Former Yugoslavia, Standards of Professional Conduct for Prosecution Counsel.

41 Draft Code of Professional Conduct for Prosecutors of the International Criminal Court, at [http://www.iap.nl.com/icc\\_guidelines.html](http://www.iap.nl.com/icc_guidelines.html) [ICC Draft Code]; see also Draft Regulations of the Office of the Prosecutor, at [http://www.icc-cpi.int/library/organs/otp/draft\\_regulations.pdf](http://www.icc-cpi.int/library/organs/otp/draft_regulations.pdf).

42 International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, *adopted* Apr. 23, 1999, at [http://www.iap.nl.com/\[IAP Standards\]](http://www.iap.nl.com/[IAP Standards]).

43 IAP Standards, Foreword.

44 Constitution of the International Association of Prosecutors, Art. 2.3 (noting that it is one of the objectives of the IAP to promote such standards).

45 American Bar Association Standards for Criminal Justice: Prosecution Function, American Bar Association Criminal Justice Section, 1993.

canonical restatement of prosecutorial standards in an influential and much-emulated system. The Standards are also of interest in part because the ABA's Prosecutorial Reform Index analyzes various countries' prosecution services in light of the ABA standards, and as such constitutes a valuable comparative, if still non-binding, assessment.

Guidelines and recommendations, however, do not determine how a particular state should design or reform a system. Reflecting their origins in non-sovereign organizations with multiple state (or private) members of diverse traditions and interests, such documents are highly general, and cannot be quickly or easily converted into specific organizational principles, draft laws, or regulations. They cannot definitively resolve disputes within a country about what would constitute an optimal arrangement; indeed, they cannot authoritatively determine what is a good or bad—let alone a better or worse—practice. There is an absence of consensus or determinative authority on the questions of what a prosecution service should do and how it should do it.<sup>46</sup>

This absence of robust, well-defined, and binding international standards might seem to suggest that there is little that can be productively said at the comparative level concerning institutional design of prosecution services. Yet this relatively open international framework itself offers an important lesson: In many states one finds an overwrought sense of institutional rigidity, and, in many transitional societies, an overly rigid commitment to strong models of prosecutorial independence. Yet a comparative view shows that many configurations are consistent with the broad parameters of international standards, and so in any given society a number of configurations may be possible. The choice among them is political and constitutional; it is negotiable.

Recognizing the political and constitutional nature of the choice in system design may free debate about reform from unnecessarily rigid assumptions about the limits of system design. Directly elected prosecutors can be consistent with international standards, and so can prosecutors directly subordinated to the executive; various disciplinary, budgeting, and reporting practices can be consistent with the standards. What one *cannot* derive from the extant international standards and a comparative examination is a claim that only a single model of the relationship between prosecutor and politics is possible.

Recognizing the availability of various models does not imply a casual or “cafeteria” approach to reform, in which states simply pick attractive options. Simply copying a design feature from one state and inserting it into another state's prosecution system will seldom do much to improve the effectiveness or efficiency of the service—or as much as a more integrated approach might—and may create more problems than it solves. Rather, it implies deliberation about the interrelatedness of different design elements. One can discern certain organic relationships between possible reform design elements; for example, early entry into the profession is often paired with longer

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46 Cf. *Access to Justice: The Prosecution Service*, United Nations Office on Drugs and Crime, Vienna, 2006, at 1 (“Due to the sheer diversity of prosecution structures and approaches, it is difficult to address all the potential issues in every system in a single assessment tool.”)

probationary periods, while strong internal hierarchical control over individual prosecutors' decisions often appears with relatively stronger institutional independence of the prosecution service as a whole. The case of Italy in particular demonstrates the unintended effects of linking the legality principle to strong prosecutorial independence norms. Direct election of prosecutors—found only in the United States—is not incompatible with international norms, but does create unique risks of introducing political considerations into the core deliberations of the prosecution service in a way that other models simply do not, and consequently requires some balancing structure or theory about the role of democratic accountability.<sup>47</sup> The point, more generally, is that individual elements of design must be evaluated in their full historical, social, and political context, and proposals for reform must consider the complex interactions of those elements with the rest of the system and with each other.

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## II. Structure and Organization of the Public Prosecution Service

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*This section considers how the prosecution service can or must be organized internally, as well as the impact different designs have on the prosecution service's ability to achieve its socially assigned purposes. The prosecution's internal structure is normally determined by the need to coordinate with other institutions and the need to respond to particular social goals. Coordination can enhance accountability, while specialization can ensure that the service is responding to general societal interests.*

*Prosecution services are financially dependent on the legislature and executive, which creates the potential for improper influence; still, the political process can help ensure accountability. Often the chief prosecutor acts as an interface between the prosecution and the political branches. There is no requirement that individual prosecutors exercise any given quantum of decisional independence; standards call for the career path of prosecutors to be clearly regulated in a manner that does not discriminate against qualified individuals. Promotion in particular often bears little relationship to the prosecution system's effectiveness or an individual prosecutor's competence.*

*States often restrict prosecutors' outside activities to ensure their neutrality. However, certain kinds of activity—such as membership in unions—may actually contribute to prosecutors' effectiveness and independence. Restrictions on outside activity ought not isolate prosecutors from the broad process of policy formation.*

*Evaluation, discipline, and training can reinforce accountability. Evaluation, if properly designed, can also increase effectiveness; however, few countries have developed effective*

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<sup>47</sup> Although direct election of prosecutors has long-standing roots in one of the world's most influential states—whose democratic and institutional traditions have frequently been emulated—this particular feature is never copied; like the non-textual constitutionalism of the United Kingdom, it functions in a highly particular historical and social context.

*evaluation systems. Similarly, disciplinary proceedings are infrequently used in many jurisdictions—indeed, the greater risk is not to prosecutors’ independence from intrusive punishments but to the accountability of an insular, self-protective guild. Initial and continuing training of prosecutors could make an important contribution to the prosecution service’s effective capacity, but here too, efforts are often haphazard.*

## 2.1. Internal structure

International standards are largely silent on the internal composition of the prosecution service;<sup>48</sup> rather, decisions about structure are guided by specific political circumstances, the shape of other institutions, and social expectations concerning the role of the prosecution service, and only at the background level might the general concern with prosecutorial neutrality suggest that, in context, a particular model may not be appropriate or may be essential.

Prosecution services vary widely in their internal structure, with most services highly centralized and hierarchical (Bulgaria, Chile, Hungary, South Africa) and others devolving considerable autonomy to individual offices and prosecutors (England and Wales, Italy and to some degree France); the federal states, Germany and the United States, present a mixed model, with multiple, highly autonomous prosecution services, yet considerable hierarchy and centralization within each individual service.<sup>49</sup>

Most prosecution services have a territorial and hierarchical structure that mirrors the organization of the court system, whether or not there is a formal institutional relationship to the judiciary.<sup>50</sup> This is a fairly conventional, though by no means nec-

48 Council of Europe Rec. 2000/19, Rec. 4 (“States should take effective measures to guarantee that public prosecutors are able to fulfil their professional duties and responsibilities under adequate legal and organisational conditions. . . . Such conditions should be established in close co-operation with the representatives of public prosecutors[.]”), Rec. 8 (“[S]pecialisation should be seen as a priority, in terms of the organisation of public prosecutors. . . .”), and Rec. 9 (“With respect to the organisation and the internal operation of the Public Prosecution, in particular the assignment and re-assignment of cases, this should meet requirements of impartiality and independence and maximise the proper operation of the criminal justice system. . . .”). The only specific standard concerns the need to memorialize hierarchical instruction in writing. Council of Europe Rec. 2000/19, Rec. 10 (“All public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement[.]”).

49 Prosecution in Germany and the United States, considered as a whole, is extremely decentralized, but *within* each autonomous prosecution service there is typically considerable centralization of authority. Indeed, in many smaller county prosecution services in the United States, there is almost no internal structure, in that the entire service consists of one or two part-time employees; in most offices, internal organization is a matter for the discretion of the District Attorney.

50 Thus this parallelism obtains both in magistracy systems, such as Bulgaria, France, and Italy, and in systems that maintain clear status separation, such as Germany. (Some German states have two Supreme Courts, and they also have two Prosecutors General.) Chile has a tripartite division of its prosecution service, corresponding to the principal administrative and territorial divisions of the state. Where courts are functionally organized, prosecution services often reflect this: Italy, for example, has special anti-Mafia prosecution directorates as well as juvenile units, corresponding to the jurisdiction of the anti-Mafia and juvenile courts, respectively.

essary,<sup>51</sup> response to prosecution services' core function as representative of state and public interests before the courts.<sup>52</sup>

Alongside this system, many prosecution services also have specialized functional divisions.<sup>53</sup> One California county has a special eight-attorney Adult Sexual Assault Prosecution Unit responsible for prosecution of sexual offenses, for example, while in Bulgaria, the prosecution office corresponding to the Supreme Court of Cassation recently created six separate units within its investigation department with responsibility for policy priorities such as organized crime, corruption, and economic crimes. In South Africa, the National Prosecuting Authority includes a National Prosecution Service responsible for most of the core functions of instituting proceedings, but also a Directorate of Special Operations, which engages in specialized investigation and prosecution of organized crime, complex financial crime, and corruption, and a Priority Crime Litigation Unit, responsible for prosecution of international crimes, terrorism and crimes against the state, and prosecutions arising out of the Truth and Reconciliation Commission process.<sup>54</sup>

Within each territorial or hierarchical office there are often functional organizational divisions, such as criminal and civil divisions and special crimes units.<sup>55</sup> Units vary tremendously in size—in Italy, for example, the 166 prosecution offices (*Procure della Repubblica*) employ between three and 117 prosecutors.

Decisional authority is similarly varied, and international standards seem to require only functional autonomy—or at least insulation from political agendas in individual cases—for the core decision-making process of the prosecution service as a whole; internally, individual prosecutors' roles in that process may be autonomous or rigidly controlled.

In some systems, superior prosecutors may intervene directly in a subordinate's case (Germany<sup>56</sup>), or may initiate a chain of instruction rather than intervening directly in work at lower levels (France). In others, there is considerably greater independence: In Hungary, for example, the prosecution service as a whole is highly independent, but within the service the Prosecutor General has almost total discretion to direct cases, even reserving a right of intervention in any given case, and has extensive authority over prosecutors' career path; each office head is likewise fully responsible

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51 In England and Wales, the Crown Prosecution Service is organized in parallel with police districts, which previously had responsibility for prosecutions.

52 Where a prosecution service interacts with other state institutions, it often has a chain of command or functional organization that parallels that of the other institution, much as it normally does the courts; for example, in Hungary, the department dealing with review of punishments principally functions at the state level, as prison administration is centralized at that level.

53 Cf. Council of Europe Rec. 2000/19, Rec. 8.

54 There are several other functional divisions within South Africa's National Prosecuting Authority, which is organized into business units responsible for different core or administrative aspects of prosecution: The National Prosecution Service is the largest such unit, but others include the Asset Forfeiture Unit, the Witness Protection Unit, and the Sexual Offenses and Community Affairs Unit.

55 For example, Hungary's prosecution offices have criminal and civil-administrative divisions; the criminal divisions have further specialized prosecutors dealing with traffic crime, juvenile crime, and (at the county level) with economic crime, organized crime, and complex cases.

56 However, the Prosecutor General may only reassign a case, not take it over personally.

for the work performed in his office, with individual prosecutors acting as his deputies rather than as truly autonomous decision-makers. In Bulgaria, a higher-ranking prosecutor in the chain of command has full power to intervene in any case and also the power to replace prosecutors on individual cases. In South Africa, the National Director issues binding general policy directives, may intervene in cases in which these directives are not followed, and may also review decisions to prosecute, although he may not otherwise intervene in the conduct of the case; more generally, ranking prosecutors with administrative authority over junior colleagues in a territorial jurisdiction can in practice overrule a prosecutor's decision to prosecute or not.

However, despite the frequent existence of a formal right of direct or indirect intervention, most systems afford considerable practical autonomy to the chiefs of individual offices to set policy and work practices within their own offices; guidance from higher levels is often sufficiently general to allow flexible responses to local conditions.<sup>57</sup> But most often this is an institutional autonomy; individual prosecutors at various stages of the hierarchy may have very limited autonomy, although practice is quite varied: in Italy, prosecutors have considerable autonomous control over their cases and cannot be reassigned without cause, but in France the principle of interchangeability (*indivisibilité*) applies, and chief prosecutors have considerable power to assign and reassign cases.

Many prosecution services rely on prosecutors to handle supervisory and administrative matters.<sup>58</sup> Especially in larger systems, this is not generally conducive to effective administration and management, and can constitute a considerable drain on the ability of professional prosecutors to focus on their core competences. In many US jurisdictions, for example, administrative divisions are overseen by prosecutors who lack specialized training—in contrast to the court systems, where administrative professionalization is far more advanced. Given the small numbers of prosecutors in US services relative to cases—itsself a function of the relatively widespread use of clerical personnel and the prevalence of plea-bargaining—this can divert scarce prosecutorial resources from core functions.

In the main, it seems clear that the internal structure of a prosecution service is normally determined by two concerns: the need to coordinate with other territorially and hierarchically organized institutions, such as the judiciary and the police, and the need to respond to particular social goals and problems by creating specialized, functional (non-territorial) units. Coordination can enhance accountability by orienting the prosecution service towards the needs of other actors, while functional

57 Even in systems that allow hierarchical intervention, this power is often exercised in a limited fashion. In Hungary, for example, the Prosecutor General's office rarely exercises its authority to take over cases; more often it reviews the case and returns it to the originally responsible office with instructions. See Sec. 3.1 (discussing prosecutorial discretion), below.

58 Germany is an exception, as generally a specialized unit reporting directly to the head of the Prosecution Service and directed by a professional manager handles administrative matters. Prosecution offices generally have large administrative staffs, and prosecutors do little administrative work. Chile also assigns management of daily operations, at both the regional and national level, to a professional executive director, and at the national level, employees are involved in management and administration, not prosecution.



specialization can ensure that the service is responding to general societal interests and legitimate policy goals.<sup>59</sup>

There are rarely strong incentives to resist functional specialization, but specialization does raise issues of internal coordination and hierarchy, as functional and territorial units may have overlapping claims to priority over certain cases; still, these concerns are probably not greater than those raised by dealing with crime across territorial jurisdictions, for example—which is one reason functional units are developed in the first place. Reform efforts should therefore consider structuring levels of responsibility to correspond with relevant external actors' organization; structures organized at odds with other institutional actors—such as the courts or police—should only be adopted for specific and persuasive reasons of efficiency or to meet a legitimately defined public goal, not for internal convenience.

## 2.2. Budgetary process

International standards are largely silent on the budgeting process,<sup>60</sup> reflecting a strong sense of deference to the core competences of the political branches,<sup>61</sup> which normally includes discretionary authority over budgeting. The standards suggest that prosecutors ought to be consulted in the formulation of the budget;<sup>62</sup> however, there is no indication that prosecutors must or even should have any particular or dispositive role in budget deliberations. The standards can reasonably be read to include a general obligation to ensure adequate funding to support prosecutorial functions,<sup>63</sup> and indeed it follows logically that the responsible authorities would have a derivative obligation to give practical effect to other obligations in the standards, or at least to not take discretionary steps to obstruct their realization; denying funding would effectively negate those obligations. Still, any such derivative obligation is highly general, and it would be difficult to ground a claim to a particular level of funding, or to funding for any particular activity, on the standards.

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59 The standards call for specialization as a hortatory goal, Council of Europe Rec. 2000/19, Rec. 8, although it is not clear how this would be formulated as a necessary measure apart from the specifics of a given system's caseload and priorities.

60 Only Council of Europe Rec. 2000/19, Rec. 4 mentions a general obligation for states to provide "budgetary means" for prosecutors to "fulfil their professional duties").

61 See, e.g., Council of Europe Rec. 2000/19, Rec. 12 ("Public prosecutors should not interfere with the competence of the legislative and the executive powers[]").

62 Council of Europe Rec. 2000/19, Rec. 4 (providing that "adequate. . .organization conditions. . .conditions should be established in close co-operation with the representatives of public prosecutors[]").

63 See, e.g., Council of Europe Rec. 2000/19, Rec. 4 ("States should take effective measures to guarantee that public prosecutors are able to fulfil their professional duties and responsibilities under adequate. . .organisational conditions as well as adequate conditions as to the means, in particular budgetary means, at their disposal["); see also Council of Europe Rec. 2000/19, Rec. 5(d) ("States should take measures to ensure that. . . public prosecutors have reasonable conditions of service such as remuneration. . .commensurate with their crucial role. . .and that these conditions are governed by law["); UN Guidelines, Art. 6 ("Reasonable conditions of service of prosecutors [and] adequate remuneration. . .shall be set out by law or published rules or regulations[").

In general, prosecution services remain reliant on the legislature, and often also on the executive, for the planning, preparation, and approval of their budgets, in a process that is inevitably discretionary, political, and often outside the control of the prosecution service itself. Budgets for prosecution may be constitutionally identified (as in Hungary), and prosecution services often have considerable formal and informal opportunities to influence the initial development and negotiation of the budget proposal (France, Hungary,<sup>64</sup> South Africa<sup>65</sup>), but do not have decisional authority. This is one of the areas in which legislatures and executives retain their greatest indirect influence on prosecution services. In Bulgaria, for example, although the Supreme Judicial Council prepares its own budget proposal for the magistracy, the government routinely submits a parallel (and considerably smaller) budget which appears to be the actual basis for parliamentary deliberations;<sup>66</sup> there is also no public review of the parliamentary budgeting process. In England and Wales, the prosecution service's budget is directly allocated by the Attorney General from the broader budget of his office determined by Parliament; the allocation is considered a matter for the executive. Even the directly elected county District Attorneys of the United States generally have no independent source of financing, and mostly negotiate a budget with county legislatures and executives, and occasionally federal, state, or municipal sources, although some prosecution services also have independent revenue sources, such as forfeiture programs. The Italian prosecution service has perhaps the most latitude in determining its own budget, as, formally at least, prosecutors are constitutionally unrestrained in their expenditures and the Ministry of Justice is obliged simply to procure the funds prosecutors deem necessary; even there, however, the legislature in fact must decide on the allocation, and of course in practice funds are not limitless.

Some prosecution services have considerable autonomy to allocate their overall budget once it is determined, although the level of autonomy within the service varies considerably: in Hungary, the Prosecutor General retains considerable control over the ultimate allocation; in Germany, individual prosecution services have recently been given greater flexibility in their own spending decisions, although this discretion does not extend to core functions such as investigations; in England and Wales, internal formulae based on levels of activity are used to disburse funds to individual offices. In the United States, District Attorneys generally have very broad discretion to allocate their budget, and as noted, the Italian system leaves the prosecution service almost total latitude.

Although this financial dependence creates the potential for improper influence, de-linkage of the prosecutorial budgetary process from other institutions and their political deliberations is not necessarily a positive aim. Even the most independent

64 In Hungary the Prosecutor General's office submits the prosecution service's budget directly to Parliament.

65 The Department of Justice consults with the National Director in preparing the budget proposal for the National Prosecuting Authority that it submits to Parliament, but the Director has no decisional authority.

66 It is common for an element of the executive—the Ministry of Finance, Treasury, or Ministry of Justice—to have final authority for preparing the actual budget proposal (for example, Chile, England and Wales, Germany, respectively) and thus the prosecution service's input is advisory.



prosecution service is funded with public monies, concerning the use of which the public reasonably has an interest. Likewise, legislators who allocate those funds have a direct political responsibility to voters for their allocative decisions, and therefore can serve as an effective and legitimated check on the prosecution services.<sup>67</sup>

Nonetheless, certain funding models can moderate the risks of improper political influence without damaging accountability: multi-year grants; block grants with minimal instructions concerning internal allocation; and regularization of the budgeting schedule (that is, avoiding *ad hoc* decisions which are more likely to be in reaction to particular decisions of the prosecutor). A few of the states examined here have seriously employed multi-year or block grant approaches to funding, such as France, which recently implemented a five-year budgeting cycle, and England and Wales, where the Treasury allocates budgets on a three-year cycle. Some states in the United States have employed formulae measuring population and crime rates to arrive at standard budget estimates, but these are fairly crude indicators of actual need, given the high variation in factors such as complexity of crime, police activities, judicial policies, availability of alternative settlement opportunities, and prosecutorial policy. As a result, some prosecution services in the United States have tried to develop more detailed workload assessments.

Even more important than a particular, technical model, however, is cultivation of a culture in which use of budgetary authority to affect individual decisions of the prosecutor or alter institutional policy is discouraged. Many of the systems examined in these Reports demonstrate such a cultural commitment.

Whatever model is employed, it is possible, and consistent with international standards, to incorporate transparent budgeting processes. Although there are certain expenditures (in connection with ongoing organized crime investigations, for example) which may have to be kept secret, in general there is little reason why the regular allocations for the prosecution services—and the deliberations leading to those allocations—cannot be highly transparent.

However, some of the services examined exhibit low levels of transparency in their deliberative and allocative processes. Chile's *Ministerio Público* negotiates its budget proposal directly with the Treasury, but does not make the process public. Bulgaria's Supreme Judicial Council reports on its spending to Parliament, but as noted above, Parliament's own budget process is not made public. More generally, the lack of regularization in the budgeting process tends to reduce transparency. Arguably, more transparent and regularized allocative processes could actually reduce the level of contestation over budgeting, by removing the deliberations from the level of daily politics or by providing agreed benchmarks for allocation that would only have to be revised occasionally rather than every year.<sup>68</sup>

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67 Independent funding schemes carry their own risks to neutrality. For example, autonomous funding—such as allocation of monetary judgments to the prosecutorial budget, like the forfeiture programs common in the United States—can create incentives for prosecutors to make decisions on the basis of a potential suspect's wealth rather than culpability.

68 In Germany, for example, it is not uncommon that prosecutors will go public with complaints about inadequate funding or staffing levels, as a way of pressuring the Ministry of Justice.

Few prosecutorial budget processes incorporate clear performance goals and indicators for their achievement—England and Wales is one that does—and this is arguably linked to the relatively low level of transparency surrounding budgeting and policy planning, as the lack of meaningful indicators reduces opportunities for the public, or even other institutional actors, to understand and involve themselves in the policy process. South Africa and the United States have perhaps the most advanced experiments in linking resource allocation to clear performance measures, although it is not clear how successful these efforts have been.<sup>69</sup> In any event, technical estimates of budgetary needs cannot on their own ensure accountability, which requires a political component: determining an accurate budget is an increasingly technical process, but successfully getting a budget approved is still a political process.

### 2.3. The status of the prosecutor general

Some systems make the very highest prosecutor or the formal head of the prosecution service a kind of interface between the functioning prosecution system and the political branches; this figure rarely engages in actual prosecution or even direct management of working prosecutors,<sup>70</sup> but instead manages a larger department in which the prosecution service is located, and he may delegate many of his formal powers to a lower official who effectively runs the service. In the French *Parquet*, for example, there is no single chief prosecutor, but rather some 35 Prosecutors General at the Courts of Appeal of equal standing under the Minister of Justice.<sup>71</sup> In South Africa, the Minister of Justice and the President have considerable influence over general policy for the National Prosecuting Authority, but the decision to prosecute particular cases rests solely with the National Director.<sup>72</sup> This model may provide a kind of political insulation, although this should not be overstated; many chief prosecutors are directly involved in the daily decisional operations of their services, especially in smaller jurisdictions.

Consistent with this model, most chief prosecutors are political appointees of some sort, in that they are appointed by the political branches in a more or less discretionary process,<sup>73</sup> and often can be removed by the political branches, although often

69 In the United States, these efforts are not centralized and results are difficult to compare across the many autonomous and highly heterogeneous prosecution systems.

70 In England and Wales, the Director of Public Prosecutions reports to the Attorney General, who only appears in court in particularly high-profile cases or human rights cases.

71 The Prosecutor General at the Court of Cassation is nominally the ranking prosecutor, but only has powers with regard to that Court. This is similar to the system in Austria, in which the Prosecutor General operates outside the framework of the prosecution service, with the sole task of appearing before the Supreme Court.

72 The Minister of Justice may require the National Director to provide reasons for his decisions.

73 In South Africa the President appoints the National Director of the prosecution service largely at his discretion. In England and Wales the Attorney General appoints the chief prosecutor at his discretion. In Hungary the President nominates and Parliament approves the Prosecutor General. In Germany, at the federal level, the Minister of Justice nominates the Prosecutor General, subject to the approval of the *Bundesrat*, and the President appoints him. The system in Chile provides multiple layers of public or political input: Candidates for *Fiscal Nacional* enter an open public competition, from which the Supreme Court forwards five candidates to the President, whose ap-

only for defined causes according to a restricted process.<sup>74</sup> In some states, although initial appointment is political and discretionary, chief prosecutors have civil service status, and their subsequent tenure is defined and insulated from further interventions by the political branches.<sup>75</sup> In England and Wales, for example, the Director of Public Prosecutions is appointed by the Attorney General after an open competition and serves at his pleasure, but is normally appointed on a fixed, three-year contract with the possibility of a two-year extension.<sup>76</sup> Consistent with this restricted political involvement, appointees may also be subject to restrictions on their political activity (Hungary). At the other end of the spectrum, the appointment of District Attorneys in the United States is a political process of direct election, which often requires considerable financial resources and political connections, and politicking skills not directly related to the actual work of supervising a prosecution service.

As with budgeting and legislative or executive oversight more generally,<sup>77</sup> the direct involvement of the political branches in the career path of the chief prosecutor may, in context, represent a potentially problematic intervention in the autonomy of the prosecution service, especially where the internal organization of the service gives the chief prosecutor considerable discretion and authority, as in Hungary.<sup>78</sup> In Bulgaria, the three appointments of Prosecutors General that have been made under the current constitutional dispensation have been strongly influenced by party-political considerations, yet in none of these cases has there been public debate about possible candidates. Prosecutors in Germany have registered concern about the recent removal or forced retirement of two state Prosecutors General because of political disagreements with the state Ministers of Justice.

Yet formal political control can in practice be constrained by the entrenchment of members of the prosecution in ministerial positions—as in Italy, where members of the magistracy largely compose the senior civil service within the Ministry of Justice<sup>79</sup>—and in any event, some measure of political involvement is unavoidable and can constitute the service's principal channel of accountability to the political representatives of society. No system under examination has created a truly independent responsible head of the prosecution service.

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pointee must be confirmed by the Senate in a special session.

74 In South Africa, the President and Parliament both must approve the suspension or dismissal of the National Director of the prosecution service. In Hungary, the President recommends and Parliament approves the Prosecutor General's removal, for specified reasons or on a finding of unworthiness to hold office—a kind of residual catch-all category.

75 This is the case in many German states, where an appointed chief prosecutor is considered a civil servant and can only be removed for specific cause.

76 England and Wales provides a good example of the cultural entrenchment of a norm of non-intervention: there the Director of Public Prosecution is seen as independent of the executive, and this view long predates the creation of the Crown Prosecution Service; indeed, the principal concern in England and Wales has been about independence from the police forces, not the government proper.

77 See Sections 4.2 and 4.3., below.

78 There has been considerable and heated controversy in Hungary over the appointment and alleged political affiliations of Prosecutors General.

79 The involvement of prosecutors in the administration of the executive raises its own issues of political entanglement, however—the risk, not of direct control by the executive, but of cooptation.

## 2.4. *The status of individual prosecutors*

Consistent with the prosecution service's obligation to conduct itself neutrally, international standards call for the career path of prosecutors—from appointment through promotion and retirement—to be clearly regulated<sup>80</sup> in a manner that does not discriminate against any group of qualified individuals<sup>81</sup> and would seem implicitly to require that career path decisions not affect the overall service's capacity to make neutral decisions about charging crimes or about conducting any other activities society assigns to it.<sup>82</sup>

*Appointment:* International standards concerning appointment are very general, and focus more on ensuring that no otherwise qualified candidate is rejected on discriminatory grounds<sup>83</sup> than on defining a minimal level of competence.<sup>84</sup> Some civil law states require extensive educational preparation, examinations, and apprenticeships (France, Germany, Italy), and may also include probationary periods (Germany, Hungary) and performance reviews (Germany, Hungary); common law countries' entry requirements tend to be somewhat lower, such as the bare requirement of a law degree, although England and Wales also has probationary periods. In Bulgaria, initial appointment has not been based on clear criteria, with open competition for entry into the system having only recently been instituted. Germany allows appeals of rejected appointment applications; even though such appeals are rarely filed, the

80 See UN Guidelines, Art. 6 ("Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations[]").

81 Council of Europe Rec. 2000/19, Rec. 5(a) ("States should take measures to ensure that: . . . the recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures embodying safeguards against any approach which favours the interests of specific groups, and excluding discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status[]").

82 Cf. Council of Europe Rec. 2000/19, Rec. 25 ("Public prosecutors should abstain from discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, health, handicaps or other status[]").

83 UN Guidelines, Art. 2(a) ("States shall ensure that: . . . [s]election criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, Language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned[]"); see also Council of Europe Rec. 2000/19, Rec. 5(a). Compare the process in Germany, in which the head of an office with a vacancy proposes a specific candidate (from among those who have completed a standard examination) to the Prosecutor General and to the representatives of female prosecutors and prosecutors with disabilities, who make a recommendation to the Minister of Justice. South Africa's law regulating appointments provides that the National Prosecuting Authority's staffing should "reflect broadly the racial and gender composition" of the country (National Prosecuting Authority Act, 32/1998, Sec. 8), but leaves the specific qualifications to the National Director to determine. Some 70 percent of the Authority's employees are from "previously disadvantaged" racial population groups (*Annual Report 2005/6*, National Prosecuting Authority, 2007, at 74); Indian/Asian and white racial groups are still considerably over-represented, however.

84 UN Guidelines, Art. 1 ("Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications[]").

opportunity increases the transparency of the process and is a disincentive for personal or political favoritism.<sup>85</sup>

*Tenure:* Most systems provide some form of tenure protection for regular or line prosecutors, although they may exempt leading supervisors and top appointees from such protection, subjecting them instead to more direct political discretion.<sup>86</sup> This is generally consistent with international standards, which call for prosecutors' career path to be insulated from improper pressure.<sup>87</sup> In some countries, prosecutors are civil servants with very secure positions (Italy, Germany, Hungary, South Africa), while in others supervisors (Chile<sup>88</sup>) or the chief prosecutor (United States) have considerable discretion to remove subordinates.

Extended probationary or training periods (up to five years in Bulgaria,<sup>89</sup> three to five in Germany, four in Hungary,<sup>90</sup> two in England and Wales, 12 months in South Africa) prior to initial full appointment can limit an individual prosecutor's practical autonomy, as his decisions may be influenced by knowledge that superiors can refuse to tenure him. Some German states have moved towards longer probation: Hesse, for example, recently introduced a five-year probationary period for each newly appointed prosecutor; although justified as a move to improve efficiency, this arrangement may in fact increase the susceptibility of individual prosecutors to political or institutional pressure. Similarly, unrestricted discretionary power to fire prosecutors (Chile, United States) may affect prosecutors' judgment in individual case decisions. However, inasmuch as there is no defined right or requirement that individual prosecutors exercise any given quantum of decisional independence, the effects of long probation are not necessarily problematic so long as the service's overall decisional autonomy is respected.

85 In one sense, influence on appointment is less problematic than influence on ongoing aspects of prosecutors' careers, since that influence cannot be exercised beyond the initial appointment; at the same time, in practice, patronage through appointment often does create forms of obligation that might allow improper influence, and a systematic bias towards certain kinds of candidates can create an institutional culture in which certain kinds of outcomes and decisions are favored without any need for direct, ongoing intervention in individual cases.

86 In many jurisdictions in the United States, prosecutors serve at the pleasure of the District Attorney, although in some line prosecutors have some civil service protections. In practice, only senior officials are usually replaced when a new District Attorney is elected. In Hungary, tenure in leadership positions is at the discretion of the Prosecutor General, although in practice such prosecutors are rarely removed.

87 UN Guidelines, Art. 6; Council of Europe Rec. 2000/19, Rec. 5(a),(c)-(d) ("States should take measures to ensure that: a. . . the transfer of public prosecutors are carried out according to fair and impartial procedures. . . ; . . . c. the mobility of public prosecutors is governed also by the needs of the service; d. public prosecutors have reasonable conditions of service such as remuneration, tenure and pension commensurate with their crucial role as well as an appropriate age of retirement and that these conditions are governed by law[]").

88 Formally, Assistant Prosecutors have life tenure until age 75, but may be removed for negligence, and in practice superiors have considerable discretion.

89 In 2003, the probationary period was extended to five years and final appointment made subject to a positive evaluation of performance, following criticisms about a lack of effective disciplinary responses to abuses of power, corruption, and poor performance.

90 This includes three years as a trainee and one year as a prosecutorial law secretary (*titkár*), prior to the initial appointment.

*Promotion:* International standards provide that promotion systems—where they exist<sup>91</sup>—should be based on objective, but not necessarily quantitative, factors.<sup>92</sup> In practice, evaluation for promotion is usually either a bureaucratized process based entirely on seniority (Italy in practice, where promotion is almost entirely automatic<sup>93</sup>) or on a combination of personal “office dynamics” and quantitative measures of performance. In either case, promotion often bears little relationship to meaningful evaluation of the prosecution system’s overall effectiveness or an individual prosecutor’s competence.<sup>94</sup> In Chile, for example, many prosecutors and several chief assistant prosecutors have complained about extreme subjectivity in the promotion evaluation process.

*Restriction on Activities:* Because society has an interest in ensuring that prosecutors exercise their functions neutrally, states not only restrict outside actors’ ability to involve themselves in the service, but also often place restrictions on prosecutors’ outside professional or personal activities. This is because prosecutors’ personal interests may affect their neutrality every bit as much as external incursions on their independence. International standards do not expressly require or recommend restrictions on activity, but (with the exceptions noted below), nothing in their terms would prevent restrictions otherwise justified on policy grounds.

States frequently bar prosecutors from holding elected or appointed political office (Bulgaria<sup>95</sup>) or governance and civil service positions (France) but this is not a uniform practice.<sup>96</sup> In Chile, prosecutors’ personal political liberty is considerably circumscribed; they are prohibited from engaging in any political activity, such as union membership or participation in political rallies, other than voting. In South Africa, prosecutors may join unions but are prohibited from striking, as they perform an “essential service[;]”<sup>97</sup> they may belong to political parties but may not preside or speak at public political meetings, nor prepare or publish any text or speech to promote or prejudice the interests of any political party. There are relatively few restrictions on outside activity by prosecutors in the United States<sup>98</sup>—where there is also considerable

91 The standards clearly contemplate the possibility that prosecution services may not have a promotion system. See UN Guidelines, Art. 7 (“Promotion of prosecutors, *wherever such a system exists*. . .”) (emphasis added).

92 UN Guidelines, Art. 7 (“Promotion of prosecutors. . . shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures[.]”); Council of Europe Rec. 2000/19, Rec. 5(b) (“States should take measures to ensure that: . . . the careers of public prosecutors, their promotions and their mobility are governed by known and objective criteria, such as competence and experience[.]”).

93 See discussion of evaluation, below.

94 The right of prosecutors in Germany to appeal a supervisor’s negative evaluation has tended to produce uniformly positive evaluations and reduced their practical value in the promotion process.

95 Magistrates may suspend their duties in order to take elected or appointed positions and are guaranteed their posts upon return, and time spent in certain public positions requiring legal skills counts towards promotion. Nonetheless, this kind of career switching is relatively rare.

96 In the United States, most District Attorneys are themselves directly elected officials. In Italy several prosecutors have been elected to offices while on leave from their official duties, to which they have returned upon completing their electoral mandate.

97 *Government Gazette* (South Africa), GNR.1216 of Sept. 12, 1997. Prosecutors have nonetheless participated in broader public servants’ strikes in 2001 and 2007; it is unclear whether any dismissals followed these strikes.

98 Far from forbidding political activity, in the United States, it is not uncommon for assistant pros-



discretion for the District Attorney in firing prosecutors—or in England and Wales.

Italy places very few restrictions on the activities of its prosecutors, allowing them to work actively in other government positions on a full- or part-time basis, as well as to switch. This has led to a blurring of the boundaries between the prosecution service and the political class through the engagement of members of the prosecution service in partisan politics. At the end of their political mandate, prosecutors usually return to their previous activities and may even find themselves in a position to prosecute (or judge) politicians with whom they interacted.<sup>99</sup>

Some states bar prosecutors from earning money from outside activity—sometimes only of a legal nature, but sometimes without regard to the kind of activity: in France and South Africa prosecutors must receive their superior's permission to earn any outside income;<sup>100</sup> in Germany outside legal work is prohibited,<sup>101</sup> and a supervisor's permission is required for other forms of outside income (and is rarely granted); Hungary limits outside economic activity and requires prosecutors to make a public declaration of their property prior to their initial appointment and every three years.

In addition to these specific restrictions, many systems at least notionally aspire to some vague measure of restraint—in Germany, for example, prosecutors are required to exercise “restraint” (*Zurückhaltung*) and “moderation” (*Mässigung*) in the extent of their political activism—but such standards are generally difficult to enforce.<sup>102</sup> In any event, there is no necessary reason to restrict all outside activity, even remunerative activity, and indeed international standards suggest that certain kinds of outside activity or affiliation—such as membership in unions, professional associations, or academic institutions—may actually contribute to prosecutors' effectiveness and independence.<sup>103</sup> Certainly in some systems, trade unions or associations are quite

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ecutors to be asked to actively support the re-election of the District Attorney.

99 One member of the magistracy noted that “political parties are convinced, more or less correctly, that the magistracy is a seat of real, heavy, often brutal power . . . and that therefore it is convenient to have personalized channels of communication with it.” A. Beria d'Argentine, “Perchè a tanti magiostrati non piace il ‘giudice candidato,’” *Corriere della Sera*, Apr. 28, 1979, at 1.

100 In South Africa, the National Director must approve such a request.

101 Prosecutors may publish books and articles, give lectures at universities and conferences, and participate in giving exams to law students.

102 Vague regulations carry risk as well. In particular, prohibitions on political activity should be defined with some degree of precision since a vaguely formulated prohibition can more easily be applied in an abusive manner to suppress internal criticism of the prosecution service.

103 See, e.g., UN Guidelines, Art. 8 (“Prosecutors like other citizens are entitled to freedom of . . . association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form. . . organizations. . . without suffering professional disadvantage by reason of. . . their membership in a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession[.]”) and 9 (“Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status[.]”); Council of Europe Rec. 2000/19, Rec. 6 (mirroring the UN Guidelines, and adding that “[t]he rights mentioned above can only be limited in so far as this is prescribed by law and is necessary to preserve the constitutional position of the public prosecutors. In cases where the rights mentioned above are violated, an effective remedy should be available[.]”); IAP Standards, Std. 6 (prosecutors “should be entitled. . . to form and join professional associations or other organisations to represent their interests, to promote their professional training and to protect their status”).

effective in representing the institutional interests of prosecutors (France). The core reservation would appear to be that restrictions on outside activity ought not limit prosecutors' collective ability to ensure their own effective operation or interaction with other social and political actors; in other words, restrictions ought not isolate prosecutors from the broad process of policy formation.

## 2.5. Individual accountability of prosecutors

*Evaluation:* International standards concerning evaluation are highly general, noting only that prosecutors should be evaluated according to objective criteria<sup>104</sup>—and indeed, it would be difficult to impose a single evaluation standard given the broad range of models for administrative oversight of individual prosecutors, ranging from near total autonomy to strong centralization. However, there is no conceptual or legal bar to evaluation, which if properly designed can increase effectiveness, and can also promote accountability.

Recurrent evaluations of prosecutors and judges during the course of their long service is a basic organizational feature of the systems of continental Europe that recruit from among law graduates with no previous professional experience. These evaluations serve a variety of functions: first, to verify that the young magistrates have actually acquired the necessary professional competence, and thereafter to choose the most qualified among them to fill vacancies at the higher levels of jurisdiction. In France, the performance of each prosecutor is evaluated every two years in addition to evaluations for promotion, and Hungary conducts a fairly extensive, if heavily quantitative, measurement of prosecutors' performance.

However, very few countries surveyed have developed effective systems for evaluating the performance of prosecutors, whether as part of a promotion process or not. Many prosecutors and several Chief Assistant Prosecutors in Chile have complained about extreme subjectivity in the performance evaluation process and a lack of relationship between evaluation measures and meaningful outcomes. Because prosecutors can be dismissed for low evaluations, some observers have expressed concern that this system might encourage subservience; however, while procedures for removal create a potential for individual dependency, the possibility of such manifest corruption is probably mitigated by the strength of civil society, the legal profession, and independent media, which are generally seen as vigilant in reporting on personnel changes within the prosecution service.

Italy is perhaps an extreme example of the failure to develop an effective system for evaluating institutional or individual performance: General inspections of prosecutors' performance are conducted every four years, but are largely formalities. Indeed, performance evaluation is considered an infringement of prosecutors' independence—in large part due to the institutional and political independence of the Superior Council of the Magistracy, which was responsible for interpreting the require-

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104 IAP Standards, Std. 6 (fifth sub-para.).



ment to evaluate its own members—with the effect that almost all prosecutors are promoted progressively to the highest rank, even if there are no positions available.

Practice in common-law countries is varied. England and Wales has a long-established tradition of quarterly and annual appraisals. Each grade and function has a set of qualities and behaviors, covering legal and managerial ability, against which prosecutors are evaluated, as well as personal targets set by supervisors; these reports are important factors in the promotion process. In the United States, on the other hand, evaluation is not well established and focuses on overall behavior and attitudes, such as conviction rates, rather than specific office goals and objectives. This may be partly due to the extremely decentralized nature of the system and the discretionary authority of directly elected District Attorneys. In addition, traditional measures of performance—such as conviction, dismissal, and incarceration rates—vary considerably depending on office policies and are not a good measure of individual performance, especially if a prosecution service also engages in non-litigation programs, such as victim services. (At the federal level there are considerably more developed performance indicators.)

*Disciplinary Procedures:* Because of the risk that disciplinary procedures can be used to punish prosecutors for personal reasons or for making unpopular or disfavored decisions in individual cases, the standards are clearer and more emphatic in defining acceptable processes for disciplining prosecutors, although they are still highly general.<sup>105</sup> However, one might also extrapolate logical limits on discretion in disciplinary procedures from the general prescription that prosecutors shall be neutral in their decision-making, as any procedure that even indirectly punished prosecutors for their decisions might create a chilling effect counter to the intent of the standards.<sup>106</sup>

All states have some processes for disciplining prosecutors. Most provide for informal cautions or sanctions that may not result in a written notation in the prosecutor's record. Formal disciplinary proceedings can be brought for an enumerated list of violations,<sup>107</sup> although in some instances these lists are extremely vague and general

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- 105 UN Guidelines, Art. 21 (“Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review[.]”), and Art 22 (“Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines[.]”); Council of Europe Rec. 2000/19, Rec. 5 (“States should take measures to ensure that: . . . e. disciplinary proceedings against public prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review; f. public prosecutors have access to a satisfactory grievance procedure, including where appropriate access to a tribunal, if their legal status is affected[.]”). See also IAP Standards, Std. 6 (fifth sub-para.)(prosecutors are entitled “to objective. . . decisions in disciplinary hearings[.]”).
- 106 In an unusual case on appeal in England and Wales in which a dismissed member of staff instituted proceedings for judicial review, the Court of Appeal indicated that that the Crown Prosecution Service’s right to dismiss a prosecutor would not extend to disciplinary actions that interfered with a prosecutor’s decisional independence. *Regina v Crown Prosecution Service ex parte Hogg* (1994).
- 107 Cf. Draft ICC Code of Professional Conduct for Prosecutors, Art. 14 (noting various “offenses against the administration of justice”), and 15 (providing for disciplinary proceedings under general United Nations staff rules or under the Rules of the Court).

(in Italy, for example<sup>108</sup>). Most commonly, the process includes an initiation phase, a hearing or trial, and designated sanctions. The authority to initiate disciplinary proceedings and the authority to decide them may be divided between two officials—mirroring the division between prosecutorial power and adjudicative power in the regular court system (as in Germany, for example<sup>109</sup> and, in part, in Bulgaria<sup>110</sup>). Although the process usually is internal to the prosecution service, appeals are sometimes made to the regular courts (England and Wales, Germany); in Italy, one third of the members who sit in special disciplinary sessions of the Superior Council of the Magistracy must be members of Parliament. In the United States in particular, disciplinary proceedings by the state bar associations can sometimes substitute for or parallel internal disciplinary hearings, as a prosecutor who is sanctioned and loses his license to practice law can generally no longer work as a prosecutor. In practice, initiation of disciplinary proceedings is restricted either to the prosecution service's internal processes or to other branches of the state; opportunities for private individuals to initiate or report complaints are not formalized or readily available in many states.<sup>111</sup>

In practice, disciplinary proceedings do not appear to be commonly used in many jurisdictions<sup>112</sup>—and indeed, it may be that the greater risk is not to prosecutors' independence from intrusive punishments but to robust accountability of an insular, self-protective guild disinclined to police itself. In Bulgaria, for example, the media have reported significant instances of prosecutorial misconduct, including reports that some prosecutors have links to organized crime, and sociological research indicates there is corruption within the Prosecution Service; yet despite this, there have been only a few cases of prosecutors being disciplined for major omissions in their professional duties.

108 In Italy magistrates are subject to disciplinary proceedings and sanctions when they “fail to accomplish their duties and conduct themselves, either in their office or outside, in a way that makes them unworthy of the trust and consideration that a judge must enjoy, or when they jeopardize the prestige of the magistracy.” Royal Decree of May 1946, no.511, Art. 18.

109 In Italy, for example, the Minister of Justice or the General Prosecutor for the Supreme Court can initiate disciplinary hearings, which are adjudicated before the Disciplinary Section of the Superior Council of Magistracy. However, in Chile, a supervisor both appoints the investigator and adjudicates the case. In France, the Minister of Justice largely retains both powers, although he must consult (in a non-binding fashion) with the Supreme Magistrates' Council. In Hungary, superiors can largely conduct the whole process on their own, although they may also appoint an investigator.

110 Disciplinary proceedings can be initiated by the relevant head of office, the Minister of Justice, or five members of the Supreme Judicial Council; proceedings are conducted by a select panel of Supreme Judicial Council members chosen by lot, who report to the full Council. Thus it is possible for the Council, as a corporate body, to both initiate and adjudicate a disciplinary matter.

111 In South Africa, the National Prosecuting Authority's Integrity Management Unit launched a dedicated toll-free telephone hotline in 2005 to provide both Authority employees and the public with a mechanism to report concerns about the work of prosecutors.

112 In France, fewer than 50 disciplinary proceedings are instituted each year; in Hungary such proceedings are also rare. In Germany, the great majority of infractions by prosecutors are handled through informal written sanctions by their superiors, without disciplinary proceedings.

*Civil and Criminal Liability:* International standards proscribe “unjustified” civil or criminal penalties,<sup>113</sup> but impliedly, therefore, there is no absolute bar on imposition of such penalties so long as they are otherwise justified. States provide a range of immunities: most provide some measure of immunity for the filing of charges (United States), statements in court (France, United States to some degree), or for official actions (Hungary, South Africa, United States to some degree). In states with a legality or mandatory prosecution principle, prosecutors may be liable for failing to initiate an investigation or for investigating an innocent person (as in Germany). In some states, politically appointed or other highly ranked prosecutors can only be charged with crimes if their standing immunity is lifted by the chief prosecutor or the legislature (Hungary). Some states indemnify prosecutors (France, Italy; Germany and Hungary for intentional acts), while others subsidize liability insurance (Germany, United States). In any event, in most jurisdictions, actual judgments against prosecutors for civil damages are quite unusual.

## 2.6. Training

International standards consider ongoing training to be an obligation for prosecutors.<sup>114</sup> To the degree that the positive aspects of independence, accountability, and neutrality can be achieved through an ethic of professionalism (that is, not solely through institutional arrangements), initial and continuing training of prosecutors could make an important contribution to the prosecution service’s effective capacity.

All systems require prosecutors to have a university degree in law in almost all circumstances; many civil law systems have substantial initial training periods, either in specialized facilities (France—two years; South Africa—six months) or through on-the-job internships (Germany—two years; Hungary—three years). In England and Wales, on the other hand, induction programs are tailored to the background of new prosecutors.

Other systems, such as the United States, require little or no initial training apart from law school; Bulgaria only instituted a significant training program in 2002.<sup>115</sup>

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113 UN Guidelines, Art. 4 (“States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability[.]”).

114 Council of Europe Rec. 2000/19, Rec. 7 (“Training is both a duty and a right for all public prosecutors, before their appointment as well as on a permanent basis[.]” and calling “in particular” for training in:

- a. the principles and ethical duties of their office;
- b. the constitutional and legal protection of suspects, victims and witnesses;
- c. human rights and freedoms as laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms. . . ; [and]
- d. principles and practices of organisation of work, management and human resources in a judicial context[.]

In addition, Council of Europe Rec. 2000/19, Rec. 8 suggests that training for specialization should be preferred.

115 Bulgaria instituted a National Institute of Justice in 2002, as part of the Supreme Judicial Council, providing for a mandatory six month training program for all newly appointed prosecutors.

Until recently, Chile had only rudimentary training programs that lasted a few weeks and often did not even involve face-to-face interaction, although now formal academic courses, on-the-job training, and refresher courses are offered through the Judicial Academy or through the Center for the Study of Justice in the Americas.

Relatively few states have systematic training for prosecutors after the initial intake period, and few make such training mandatory. Such continuing training facilities and requirements as exist vary widely, from systems with mandatory advanced training directly related to promotion prospects (England and Wales), to systems in which all training is optional (France and Germany<sup>116</sup>) and there are few career consequences for participation (United States).<sup>117</sup> In South Africa, yearly training is organized for all prosecutors, including refresher courses in general criminal procedure, evidence and trial advocacy; dedicated training in the latest legal developments occurs via a selection process, as places in such courses are limited. In Italy, continuing training is for magistrates in general, not only prosecutors.

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### III. Functions and Powers of Prosecutors

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*This section considers the substantive and procedural powers of the prosecution service, especially in the level of discretion prosecutors exercise in initiating, continuing, discontinuing, or controlling investigation and charging, and their relationship to the courts in the pre-trial process.<sup>118</sup> Most systems accord the prosecution a near total monopoly on pursuing criminal offenses before the courts.*

*Most systems evince a mixture of the opportunity and legality principles in practice. Prosecutors in both systems appear equally susceptible to political pressure to coordinate their efforts with anti-crime campaigns. Even a pure legality principle can increase prosecutors' power relative to other social and institutional actors when coupled with strong norms of prosecutorial independence. What seems essential is to ensure transparency of decision-making and opportunities for evaluation.*

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116 In France, the School of the Magistracy offers optional trainings that are well-attended by prosecutors, who appreciate their quality and diversity, especially if they are hoping to specialize more deeply or to change positions. Similarly, in Germany, prosecutors wishing to specialize greatly increase their chances of advancement by participating in continuing training; for all prosecutors, although training is voluntary, failure to keep up with new developments can lead to a charge of gross negligence.

117 The United States has mandatory but fairly minimal and unfocused CLE (Continuing Legal Education) requirements organized by the state bar; prosecution services as such normally offer no training, and there is little relationship between CLE and evaluation or advancement. In Hungary, most training is optional, although there are occasional mandatory courses in new developments; in addition, prosecutors may pursue post-graduate studies partly subsidized by the prosecution service, and this additional education may be considered in evaluation and promotion.

118 The prosecution service's relationship to police and the courts is addressed here as it relates to the core functions of the service, but is considered more fully in Section IV, below.

*In practice, it is quite rare under either an adversarial or inquisitorial model for a court to compel a prosecution service to pursue a case against its will or in a manner not of the prosecution's choosing. Most investigative actions that might impinge upon core rights require the approval of a judge, although there are narrow circumstances in which the prosecution may undertake such measures on its own authority.*

*In most jurisdictions, there is a clear functional and organizational division between criminal law divisions—generally identified as the defining, core competence of the prosecution—and civil or administrative law divisions.*

### 3.1. Prosecutorial functions in criminal justice

Most systems accord the public prosecution service a near total monopoly on charging and prosecution of criminal offenses. Some states retain a residual right of private prosecution (especially England and Wales,<sup>119</sup> but also Bulgaria, Chile, France, Germany, Hungary, and South Africa), but such rights are often quite limited and, in practice, private prosecution is difficult and disfavored.<sup>120</sup> International standards clearly assume that public prosecutors will be the principal vehicle for initiating and pursuing criminal processes.<sup>121</sup>

*Discretion to Initiate Prosecution:* The choice between a system based on opportunity or legality—that is, between discretionary or obligatory investigation and prosecution—is one of the fundamental distinctions among legal systems.<sup>122</sup> Bulgaria, Chile, Germany, Hungary, and Italy employ the legality principle, while England and Wales, France, South Africa, and the United States employ the opportunity principle, in which courts—in their passive role—cannot criticize or sanction the prosecution for failing to pursue a charge. It is clearly a choice of policy, as international standards anticipate both variants;<sup>123</sup> both approaches can yield normatively acceptable prosecution systems.

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119 In England and Wales, a number of other state agencies and authorities besides the Crown Prosecution Service have powers to bring cases before the courts and to prosecute at the local level. Although neither the Report nor this Overview discuss these in detail, the general arguments concerning the role of a prosecution service and its relationship to other institutions and to society apply to them as well inasmuch as they exercise functionally similar powers.

120 In Hungary, for example, the prosecution service may take over a private prosecution at its discretion, and private appeals of the prosecution service's decisions in cases under its control are rarely successful.

121 See, e.g., Council of Europe Rec. 2000/19, Recs. 1-3.

122 See, e.g., Council of Europe Rec. 2000/19, Explanatory Memorandum (General Considerations) ("It is a fact that European legal systems are still divided between two cultures—the split being evident both in the organisation of criminal procedure (which is either accusatorial or inquisitorial) and in the initiation of prosecutions (under either "mandatory" or "discretionary" systems). However, the traditional distinction is tending to blur as the different member states bring their laws and regulations more closely into line with what are now common European principles, in particular those laid down in the Convention for the Protection of Human Rights[,] and noting the distinction between the traditional "French" and "Anglo-Saxon" models). Note that the traditional division is not always clear-cut, as today both France and England and Wales—the classical exemplars of the two models—employ the principle of opportunity.

123 UN Guidelines, Art. 17 ("In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consis-

In practice, most systems are mixed. Even systems operating under the legality principle invariably have some pragmatic mechanisms to allow discretionary prosecution, acknowledging both the practical impossibility of actually investigating and prosecuting every crime and the phenomenon of attention—that the very decision diligently to pursue a possible crime makes it more likely that one will find it, and not something else. Since laws are generally written in quite abstract terms to fit a broad range of situations, prosecutors in all countries use some amount of discretion in their decisions to file a case, in selecting charges, and in recommending a sentence. This is a reality even in countries that do not formally recognize prosecutorial discretion.

In Germany, for example, successive reforms have gradually introduced elements of opportunity, allowing prosecutors to treat different categories of crime differently, or to divert cases in favor of alternative sanctions, such as monetary payments or community service. In Chile, recent reforms have radically reduced the legality principle; for example, prosecutors now have a right to divert cases under defined circumstances, and the legality principle now only applies to cases in which the potential penalty is two years' imprisonment or more—and even then this obligation only obtains if prosecutors decide to bring such charges rather than lesser ones or none at all.<sup>124</sup> The standard turn in such countries is to exercise effective opportunity by avoiding investigation or charges in the first place, often through definitional means.<sup>125</sup>

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tency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution[ ]”). Standards do seem to favor a limited application of discretion in particular circumstances. See, e.g., UN Guidelines, Art. 18 (“In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment[ ]”), and Art. 19 (“In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special considerations shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary[ ]”). See also IAP Standards, Std. 4.3 (encouraging prosecutors to waive, discontinue or divert charges, especially for young defendants).

124 Similarly, in Hungary if an offense is punishable by less than three years' imprisonment, the prosecutor may postpone bringing charges for one year, or two years if he considers that the offense was not grave, there are extraordinary mitigating circumstances, and there is a favorable change in the offender's behavior.

125 The structure of the Bulgarian criminal justice system, involving separate, autonomous agencies, and the rule of mandatory prosecution (the legality principle) have resulted in a system that establishes priorities and copes with excessive workload by delaying investigations. It is not unusual for a trivial or commonplace offense, such as a minor theft, to be brought for trial seven or eight years after the fact; many investigations are left pending for years, with definitive decision delayed again and again. Thus, discretion is effectively exercised by delaying a final determination on charging. Efforts to resolve this have included mandatory deadlines for finishing investigations and procedures for criminal defendants to petition the court either to compel the prosecutor to file charges or terminate proceedings if the prosecutor has not filed charges after two years, but these reforms do not address the underlying problem of prioritization.



On the other hand, systems operating under the opportunity principle demonstrate normative commitments to professionalism, non-partisan neutrality, and non-arbitrariness that tend to produce results similar to those in systems using the legality principle: it is difficult for prosecutors in opportunity-based systems simply to ignore clear evidence of a serious crime—or to prosecute in the absence of any compelling evidence.<sup>126</sup>

In England and Wales, in deciding whether or not to prosecute, the prosecutor considers an evidentiary test and a public interest test; if the case fails either test, it may not be pursued.<sup>127</sup> In South Africa, a prosecutor has a duty to pursue charges if there is a *prima facie* case and there is no compelling reason for a refusal to prosecute; however, charging policy has been broadly interpreted, making a decision to prosecute the exception rather than the rule, with prosecutors declining to press charges in fully 60 percent of dockets received from the police and referring another 26 percent for further investigation.<sup>128</sup> In the United States, although prosecutors have almost total formal discretion, as a practical matter they often have to provide reasons for non-prosecution to victims, police, and the public, and often District Attorneys require subordinates to justify decisions not to prosecute in writing.

Prosecutors in both kinds of systems appear to be more or less equally susceptible to public and political pressure to coordinate prosecutorial efforts with anti-crime campaigns or particular sources of social outrage—an example not only of potentially improper influence, but of the attention phenomenon. And even though, in both civil and common law systems, prosecutors have obligations to the court and to the truth,<sup>129</sup> it is evident that in practice prosecutors are principally focused—institutionally, professionally, and even personally—on securing conviction,<sup>130</sup> which tends to reduce the theoretical differences between discretionary and non-discretionary systems.

The risks inherent in affording prosecutors unregulated discretion in their decisions about investigation and charging are fairly obvious. However, the legality principle can also increase prosecutors' power relative to other social and institutional actors,

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126 Cf. UN Guidelines, Art. 14 (“Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded[.]”); IAP Standards, Std. 2.1 (“The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference[.]”).

127 The evidentiary test aims at establishing whether sufficient evidence has been collected to allow a realistic prospect of conviction. The public interest test is a contextual assessment, based on an exemplary list of factors favoring or opposing prosecution. These factors were initially very generally defined and caused some confusion among prosecutors, the police, and the public; subsequent editions have sought to provide more detail.

128 In South Africa, prosecutors have the further option of directing a preparatory examination in magistrates court—a lower instance—to determine if the evidence warrants a proper trial in superior court. The accused pleads at the end of the proceeding, rather than the beginning, and the prosecutor may decide to proceed to trial with any charges—whether a plea of innocent or guilty has been entered—or to decline prosecution.

129 These obligations are more extensive and explicit in classically inquisitorial civil law systems than in adversarial systems.

130 In Italy, for example, 13 percent of lawyers in one survey reported that prosecutors had hidden exculpatory evidence. G. Di Federico & M. Sapignoli, *Processo penale e diritti della difesa: la testimonianza di 100 avvocati penalisti* (2002), at 16, 102 (table 4.3).

especially when coupled with strong norms of prosecutorial independence. Italy is an example of this: Because prosecutors have a constitutional obligation to investigate all possible acts of criminality, it is relatively difficult for other actors to oppose any action a prosecutor undertakes, regardless of expense or intrusiveness. The broad scope of action Italian prosecutors enjoy in criminal proceedings and the coercive measures at their disposal have progressively afforded them *de facto* influence over public policy in the criminal sector; their power restricts the role of the defense and renders the protection of their clients' civil rights during the lengthy phase preceding trial dependent on the good will of prosecutors. At the same time, prosecutors have taken on an ever more visible role as "problem solvers" for a considerable number of current political, social, and economic issues, including workplace safety, pollution, tax evasion, bank fraud and similar economic crimes, terrorism, organized crime, and public corruption (where their successful initiatives have caused substantial changes in the political leadership and party structure of the country). The net effect, in a system that combines a constitutional obligation to investigate with strong norms of independence, is to afford prosecutors nearly unrestricted and unaccountable discretion in practice—the "personalization of prosecutorial functions" (*personalizzazione delle funzioni del pubblico ministero*).

Rather than maintaining a pure policy of legality or opportunity, therefore, what seems essential is to ensure transparency of decision-making,<sup>131</sup> and internal and external opportunities for re-evaluation, appeal or alteration. Requiring written accounts of decisions on initiating and terminating investigation, review by courts,<sup>132</sup> regular reporting to political actors, and encouragement of a vigorous investigative media can ensure that prosecutors do not abuse the practical exercise of discretion in either system. Private prosecution (Bulgaria,<sup>133</sup> Chile, England and Wales, Germany) or other rights to appeal prosecutorial decisions (Bulgaria,<sup>134</sup> Chile, Germany), for example, though rarely invoked in most systems, can act as a reserve check on a prosecution service that ignores socially serious crimes, and can ensure that prosecutors do not abuse their effective discretion, at least as regards failure diligently to pursue evidence of crime.<sup>135</sup> Stronger internal or external disciplinary norms would address

131 In France the *Parquet's* application of the discretionary principle has been systematized through the use of statistics to identify the different situations in which it has been implemented.

132 In France, a victim dissatisfied with a prosecutor's decision to terminate an investigation can request an examining magistrate to conduct an investigation. Such requests constitute a significant percentage of cases submitted to examining magistrates (often cases of fraud related to commercial interests or private issues). The magistrate must consider whether any criminal offense exists, even if the prosecutor previously dropped the case. At the end of the investigation, the examining magistrate decides whether the case will go to trial and the victim will be authorized to attend the trial to request civil compensation. This provides a guarantee against prosecutors' abuse of discretion.

133 Victims have standing to bring charges for minor bodily injuries, certain injuries between close relatives, and criminal libel.

134 Judicial review of decisions to terminate criminal proceedings was introduced for the first time in 1999, but the procedure has been amended several times since then: at first review was automatic and *in camera*; this was changed to appeal by interested parties to all three levels of courts, up to the Court of Cassation; and the most recent amendments made those decisions subject to one level of appeal by a single judge. However, there are no studies of decisions not to prosecute and no studies of how successful judicial review of those decisions has been.

135 The courts are not an effective check on prosecutorial under-investigation. In France, for example, the criminal courts are prohibited from criticizing the *Parquet's* decisions about whether or not to



the risks of abusive or persecutory investigation prior to the charging phase, when judicial oversight becomes more effective. However, at present no state has a comprehensive, systematic method of policing abuses of prosecutorial discretion, whether they involve over- or under-investigation.<sup>136</sup>

*Control of Ongoing Prosecution:* In the adversarial model, the trial is the focal point of the whole process; at trial, the parties have to build the case before the hearing judge. In some adversarial jurisdictions (Italy, United States), prosecutors have some discretion in requesting expedited hearings: in addition to full trial proceedings—that is, ordinary proceedings—there are also alternative proceedings aimed at speeding up the process or encouraging an agreement between the parties. Judges have ultimate control over the course of trial, but the prosecution service's initiating role gives it considerable ability to influence the course of events.

For example, in England and Wales, once an indictment has been issued in the Crown Court, the prosecution must petition the court to discontinue a case; however, while this formally gives the court decisional power, the prosecution may simply refuse to submit sufficient evidence, thus effectively compelling the court to acquit. In the United States, prosecutors can engage in extensive plea bargaining during the trial (subject to judicial approval, although this is only very rarely withheld), creating a somewhat broader range of strategic options for the prosecution. In South Africa, both the accused and the prosecution have an opportunity to withdraw from a plea agreement upon being informed of the actual sentence the court intends to impose pursuant to the agreement; if either withdraws, the trial proceeds *de novo* before a different presiding judge.<sup>137</sup>

In the inquisitorial model, the investigative phase is relatively more important. In Hungary, for example, the prosecution service has the predominant role in this phase, directing the investigative work of the police or, more rarely, conducting its own investigations. The prosecution service makes the ultimate determination on commitment, or bringing charges; the courts may request additional information during the investigation phase but cannot order it, and this serves only to indicate the judge's likely disposition towards the case, control of which remains with the prosecution. At court, the prosecutor must be present in first instance courts at the county level and for certain cases carrying a significant penalty, and may take part in any trial.

However, since the trial phase plays a relatively smaller role in the inquisitorial model, the prosecution retains considerable strategic room for maneuver in deciding when and how to proceed with a case,<sup>138</sup> although there are often specific investigatory acts that require judicial approval, such as seizures and pre-trial detention (Germany).<sup>139</sup>

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institute criminal proceedings in a given case, and even in states in which there is no such formal prohibition, review of decisions not to charge is almost unheard of (United States).

136 See Sec. 2.5, above.

137 Some form of bargaining, however informal, is in practice found in almost all systems.

138 In many inquisitorial systems, such as Hungary, there are statutory limits on the time available for a prosecution service to decide on the disposition of a case once it has been received from the investigatory agency; within those limits, however, discretion lies with the prosecution, not the court.

139 See next section.

The prosecutor retains the power to initiate and direct the investigation; the powers of the court in the pre-trial process serve instead to guarantee basic rights, by acting as an external monitor not directly involved in the investigation.

In practice, it is quite rare under either an adversarial or inquisitorial model for a court to compel a prosecution service to pursue a case against its will or in a manner not of the prosecution's choosing.

*Post-Sentencing Functions:* Some states accord prosecutors supervisory responsibility over enforcement of sentences, as well as a representative role in parole and clemency hearings. In Germany, special officers in each Prosecution Office enforce final verdicts, including the collection of fines and confinement of individuals, and monitor the enforcement of prison sentences. In France, Germany, and Hungary, prosecutors monitor the enforcement of judgments and sentences; in France, they can summon the assistance of special law enforcement bodies (*la Force Publique*) to assist in this. In Hungary, a special department in the prosecution service monitors the treatment of prisoners. All these activities may be understood as a continuing element of the prosecution's responsibility, in certain states, to ensure legality.

In France, prosecutors can suspend certain sentences of less than three months of their own accord—an instance of a more properly adjudicative function exercised by the prosecution—and can propose to the court the suspension of sentences longer than three months. In Germany, South Africa, and some states in the United States, prosecutors appear in hearings on clemency, probation, and parole or early release. In other states, the prosecution's authority to advise on or request adjustment of sentences is limited to the actual trial phase (as in Hungary).

### 3.2. Relationship with the judge at the pre-trial stage

Prosecutors have initiatory powers, judges have adjudicatory powers; this core functional distinction also gives judges marginally greater power in relation to prosecutors in many circumstances, especially once a particular case has advanced to the trial stage. This imbalance in power logically follows from judges' role as the final line of protection for individual and social rights and interests, and is consistent with—indeed, a principal justification for—the typically greater independence that individual judges and the judiciary as a whole are afforded compared to prosecutors and the prosecution service. Accordingly, most investigative actions that might impinge upon core rights or fundamental freedoms require the approval of a judge, although there are circumstances in which the prosecution—or other agencies with responsibility for investigation—may undertake such measures on their own authority. Although these circumstances are formally narrow, in practice prosecutors have considerable latitude to judge for themselves whether or not circumstances constitute an emergency that allows them to act on their own initiative, and they rarely face censure after the fact.

*Pre-Trial Detention:* Deprivation of liberty prior to final adjudication is widely rec-

ognized as a practical social necessity in various circumstances, such as risk of flight, risk of further violation or harm to other individuals, risk that evidence might be destroyed, or compelling need to secure an individual's testimony. At the same time, any deprivation of liberty potentially constitutes one of the most serious violations of human and civil rights.<sup>140</sup> Most states require prosecutors to seek judicial approval for all forms of pre-trial detention, generally within a defined time period (for example, 48 hours in South Africa, 72 hours in Bulgaria and Hungary). In France, a prosecutor must seek judicial approval to detain a suspect only for periods greater than 48 hours.<sup>141</sup> In Chile, the previously considerable discretion afforded prosecutors has been greatly reduced by the introduction of a presumption against detention and review by the judiciary.

*Surveillance Warrants:* Similarly, effective investigation often requires covert or intrusive monitoring of individuals' activity and communications or their private premises. Yet such actions risk infringement of individuals' core rights of privacy and physical or bodily integrity. Most states require prosecutors to seek judicial approval for all or most forms of surveillance. In some defined exigent cases, prosecutors may authorize surveillance and only later seek judicial approval (Hungary—approval up to 72 hours).

### 3.3. Powers outside the criminal justice system

In most jurisdictions, there is a clear functional and organizational separation between criminal law divisions—generally identified as the defining, core competence of the prosecution<sup>142</sup>—and civil or administrative law divisions; international standards, while identifying a range of possible functions for a prosecution service,<sup>143</sup> also favor specialization,<sup>144</sup> which in practice tends to maintain the separateness of the core criminal prosecution functions. In effect, therefore, we may productively speak about a functionally separate, identifiable criminal prosecution service in many countries, even where other functions are formally cabined within the same organization.

In some states, the prosecution service has extensive authority to represent state organs in civil suits, to take over civil suits for or otherwise represent the interests of designated classes of individuals, and to generally supervise the legality of actions by

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140 Cf. *Asenov and Others v. Bulgaria*, ECHR judgment of Oct. 28, 1998; *Nikolova v. Bulgaria*, ECHR judgment of Mar. 25, 1999.

141 In practice, many of these rules can converge: requiring the prosecution to secure judicial approval *within* 48 hours, or allowing the prosecution to detain a suspect for 48 hours *without* judicial approval can amount to the same thing, although in the former instance the prosecution is under a continuing obligation during that time. Much of the difference—and the substantive level of protection—depends on how these rules are regulated and enforced.

142 Cf. Council of Europe Rec. 2000/19, Rec. 1 (“Public prosecutors” are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system[ ]”).

143 See Council of Europe Rec. 2000/19, Recs. 2 and 3.

144 See Council of Europe Rec. 2000/19, Rec. 8.

individuals and state organs.<sup>145</sup> In France, the *Parquet* takes part in civil and commercial proceedings,<sup>146</sup> and also maintains cooperative relationships with local and administrative authorities on matters of public order; a special prosecutor dealing with minors works at each Court of Appeals. In Bulgaria, the powers of the Prosecution Service extend to administrative and civil proceedings (such as representing the state in civil trials and pursuing commitment hearings) as well as criminal cases.

In Hungary, the legal operation of the public administration is considered to be a public concern, and thus the Prosecution Service supervises the legality of regulations issued by sources below the level of the government (that is, ministerial ordinances and local self-government ordinances), and decisions of non-judicial organs dealing with labor and service relationships. This review does not, as a rule, involve individual cases; rather, prosecution offices, including those at the local and country level, are expected to carry out general reviews every half year, and legal and disciplinary proceedings are a normal consequence of this activity.<sup>147</sup> The Prosecution Service also has certain powers in civil litigation concerning personal status (such as establishment of parenthood) and is entitled to act as plaintiff in cases regarding the validity of marriage or an individual's mental status, or on behalf of persons who are unable to enforce their own claims.

In the United States, roughly half of all District Attorney's offices also represent their local government in civil cases; in addition, prosecutors' offices have increasingly been creating and implementing victim assistance programs. Victim advocates act as liaisons between the victim and prosecutor, relaying information between parties and insuring that victims and witnesses appear at trial, which frees the prosecutor to focus on core investigative and trial functions, while also promoting community support for and satisfaction with the work of the service.

In other states, the prosecution service has no other powers outside the criminal justice system (Chile, England and Wales, South Africa<sup>148</sup>).

145 In many legal systems in Central and Eastern Europe and Latin America, however, the prosecution authority has authority in matters besides just criminal prosecution. In many states in Brazil, for example, the *Ministerio Público* is responsible not only for protecting public interest in matters of civil and administrative law, but also for the role of criminal defense as well as prosecution. Called *promotores*, these officials are administratively but not professionally distinct from prosecutors. See Rosângela Batista Cavalcanti, *Cidadania e Acesso à Justiça: Promotorias de Justiça da Comunidade*, IDESP, São Paulo, 1999.

146 This includes intervention in bankruptcy and violations by corporations. The civil unit in each prosecution office can offer legal opinions to the civil courts on behalf of the general interest of society, in order to avoid leaving issues of public importance purely to private interests.

147 The Prosecution Service may annul minor administrative punishments, without recourse to the judiciary.

148 The National Director can institute civil proceedings for the forfeiture of assets in the High Courts; the property being targeted must be either an instrumentality of an offense, the proceeds of unlawful activities, or associated with terrorist activities.

## IV. Relationship of the Public Prosecution Service to Other Organs of the State

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*This section considers how the relationship of the prosecution service to other state institutions affects its ability to provide efficient, non-political decision-making relating to its core functions in the justice system.*

*The prosecution should be functionally independent of the political branches in its core decision-making and, in turn, should not unduly influence those branches. Beyond this minimum, the possibilities for constitutional design are very broad; the relevant question is whether a particular arrangement, in context, contributes to the realization of that non-political function or not.*

*Most legislatures exercise indirect control over prosecution services through appointment and dismissal, legislation, the budget process, and powers to require information. Such control is often thought of as improper interference, but it is also a form of democratic accountability. Legislative involvement becomes progressively more problematic as it moves towards ad hoc intervention in individual cases.*

*The principal threat to prosecutorial independence in most states has been seen to come from the executive; in practice, executive influence over the prosecution service varies widely. International standards aim to limit executive authority in two ways: authority should be transparent, and it should be regularized.*

*The relationship between police and prosecutors is an example of how different structures must be considered comprehensively, not in isolation. The discretion afforded prosecutors in common law states traditionally co-exists with an independent police force and a powerful judiciary. In civil law systems, by contrast, there has been less need for independent review of acts that were not discretionary.*

*There are patterned differences in the level of autonomy and the direction of control between judges and prosecutors, even in systems that treat both as members of a common magistracy. Any conflation of the initiating and adjudicating roles creates risks for society as a whole; it is bad principle and bad policy to allow prosecutors to be either subordinated to, or overly identified with, the very judges with whom they must work.*

### 4.1. The constitutional location of the public prosecution service

International standards do not prescribe a single constitutional or institutional arrangement for prosecution services—and indeed expressly acknowledge that widely divergent models are possible—but broadly considered, they suggest that whatever arrangement is adopted, the prosecution should be functionally independent of the

political branches in its core decision-making<sup>149</sup>—and, in turn, should not unduly influence those branches.<sup>150</sup> Beyond this minimum, the possibilities for structural reform are very broad, and there is no necessary or theoretical reason why in a given system or tradition any of the major models must be excluded.

Some prosecution services are constitutionally or conventionally identified as part of the executive (England and Wales, Germany,<sup>151</sup> South Africa), others as part of the judiciary or magistracy (Bulgaria, France,<sup>152</sup> Italy), and still others are largely or wholly independent (Chile, Hungary, United States<sup>153</sup>); in many states, the prosecution service has an effective monopoly, while in some cases (England and Wales), other institutions have prosecutorial powers. All, however, share a measure of professional autonomy and an expectation that prosecution services' decisions and conduct will be "non-political," in the sense that individual investigative and charging decisions ought not be directly affected by the interests and agendas of outside political actors, but only by general, pre-existing goals legitimately determined in the political process.<sup>154</sup> This seems the most important, defining element in their functional constitutional relationships: whether or not they have formal independence from an-

149 See, e.g., Council of Europe Rec. 2000/19, Rec. 13 (providing that "[w]here the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that. . .a. the nature and the scope of the powers of the government with respect to the public prosecution are established by law; b. government exercises its powers in a transparent way. . .; c. where government gives instructions of a general nature, such instructions must be in writing. . .; d. where the government has the power to give instructions to prosecute a specific case, such instructions must carry with them adequate guarantees that transparency and equity are respected. . ."); IAP Standards, Std. 2.2 ("If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be: transparent; consistent with lawful authority; subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence[]").

150 See, e.g., Council of Europe Rec. 2000/19, Rec. 12 ("Public prosecutors should not interfere with the competence of the legislative and the executive powers[>").

151 There is some theoretical debate in Germany as to the institutional identity of the prosecution services. The federal and state constitutions do not discuss the prosecution services. The authority exercised by federal and state Ministers of Justice over prosecutors, the hierarchical nature of prosecution offices, and the ability of senior prosecutors to give instructions to lower-ranking prosecutors lead some scholars to describe the service as part of the executive. At the same time, the existence of statutory limitations on the ability of political officials and senior prosecutors to instruct lower-ranking prosecutors, prosecutors' duty of objectivity, and their ability to terminate criminal proceedings lead others to describe the prosecution as a separate organ of the criminal justice system (*Organ der Rechtspflege*). Some scholars believe that the prosecution occupies an intermediate position between the executive and judiciary; however, the Constitution does not envisage the existence of any intermediate branch of the state. The dominant view is that the prosecution services are authorities within the executive whose individual agents exercise their power in a non-political fashion.

152 The *Parquet* is not explicitly defined as belonging to the judicial or executive branch, but the dominant view is that the *Parquet* belongs to the judiciary. The Constitutional Court has frequently emphasized that prosecutors have special powers to protect human rights, individual freedoms, and property, which in turn implies that prosecutors should possess important guarantees of independence in their decision-making and career paths similar to those of judges, and indeed prosecutors and judges are both represented in the Superior Council of the Magistracy. However, its hierarchical structure and its subordination to the Minister of Justice lead certain authors to refer to the "attachment" of the *Parquet* to the executive.

153 At the county level, where most District Attorneys are directly elected officials; the (much smaller) federal prosecution service is clearly part of the executive.

154 Consistent with the standards noted above, prosecution services' decisions themselves ought not aim to give effect to specific political goals or directly affect that legitimate political process.



other branch, prosecution services are expected to behave as if they are not beholden to political actors in their individual decisions.

This would also imply that the prosecution service should itself not undertake to play a direct role in the political process apart from the institutional defense of its prerogatives and operational freedom; this is a difficult definitional line—prosecution services have legitimate political and institutional interests, and thus a stake in particular political programs—but a prosecution service would definitely cross it if it alters the selection and pursuit of particular prosecutions to favor or punish actors in the political process.<sup>155</sup>

Thus there is no quantum of independence or accountability, nor any particular constitutional or institutional arrangement, that is necessary or appropriate for its own sake. The relevant question is whether a particular arrangement, in context, contributes to the greater realization of that non-political function or not.

## 4.2. Relations with the legislature

Most legislatures<sup>156</sup> only exercise indirect influence on the prosecution service.<sup>157</sup> Nonetheless, legislatures exercise control over prosecution services in four ways: through direct powers of appointment,<sup>158</sup> discipline and dismissal,<sup>159</sup> through legis-

<sup>155</sup> In Bulgaria, for example, the prosecution service has reportedly engaged actively in tacit alliances with political parties or individual politicians, with the purpose of influencing legislation to preserve prosecutors' powers and autonomy. These alliances have evidenced themselves in investigations and prosecutions which have demonstrated clear political motivation: the service has refrained from investigating members of the cabinet or the majority in exchange for preservation of its institutional powers, while it has investigated and charged opposition and majority figures who pursued policies perceived to be antithetical to the interests of the service. In South Africa, the prosecution service has become involved in political battles within the ruling African National Congress, with the National Director intervening in particular cases that exhibit political sensitivities. In one case the Director intervened in favor of ANC members in a bail question, while in 2003, the Director announced that no charges would be sought against the sitting Deputy President, also a member of the ANC, in a major corruption investigation despite evidence of a *prima facie* case against him, which as noted above normally triggers a duty to prosecute. (A subsequent Director announced plans to charge the Deputy President, but the matter is still pending.)

<sup>156</sup> In the United States, the more relevant units are the county governments, which are the principal source of funding for prosecution services. State legislatures generally define the criminal law and criminal policy in broad terms, however, and some funding comes from the state level.

<sup>157</sup> In France, Germany, and Italy, for example, legislators must direct inquiries about the prosecution service to the Minister of Justice, rather than posing them directly. The British Parliament may not conduct independent investigations into the activities of the Crown Prosecution Service or individual prosecutors, and it receives the Service's annual report from the Attorney General.

<sup>158</sup> Hungary's Parliament appoints the Prosecutor General; in Chile and the United States (at the federal level), the Senate approves the President's appointment for *Fiscal Nacional* and Attorney General, respectively; in the United States the Senate must also approve the President's nominees of the chief Attorneys for each region, who are usually only nominated after informal approval by the Senators from the state in which they will serve.

<sup>159</sup> For example, Chile's legislature can initiate impeachment proceedings against senior prosecutors for a defined list of offenses, which the Supreme Court must then adjudicate. There is little reason to believe that this power serves as an effective accountability check on the *Ministerio Público*, however: the range of offenses for which such a proceeding is authorized is highly general and ill-

lation;<sup>160</sup> through the budget process;<sup>161</sup> and through mechanisms for requesting or requiring regular or *ad hoc* information about general policy or individual cases.<sup>162</sup> Even when this influence is indirect, it can be considerable, both at the level of broad strategy and in individual charging decisions. In Bulgaria, for example, Parliament has few direct formal powers over the Prosecution Service, yet it has demonstrated a clear tendency to make assertive use of its legislative powers to influence the conduct of law enforcement—including highly contested attempts to use amendment of key legislation as a pretext for altering the membership of the institutions governing the magistracy—because of public pressure for more results in the fight against crime, and because of the executive's relative lack of authority in investigation and prosecution.<sup>163</sup> On the other hand, in South Africa, the legislature's formally extensive powers of oversight have been little used, apparently in deference to the power of the executive and a lack of expertise and resources.

Considering the explicitly political nature of its functions, a legislature on its own has few incentives to avoid politicizing the work of the prosecution. This control is often thought of as, at least potentially, a form of improper interference, but it is also a form of democratic accountability, as the legislature is in some states the only body directly accountable to the electorate; its involvement in the operation of the prosecution service is a way of ensuring that the service does not become self-justifying and self-serving. For example, legislatures often introduce new laws to alter or even circumvent the authority and discretion of prosecutors and judges, especially when their decisions arouse public consternation;<sup>164</sup> depending on one's perspective—more precisely, depending on the purposes society has assigned to the prosecution—this may constitute interference with prosecutorial independence or a democratic exercise in accountability.

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defined; also, the members of the Court themselves create the original list of candidates from which the President makes a nomination, and thus may already have approved the particular prosecutor whose proposed removal is before them.

160 See, e.g., UN Guidelines, Art. 11 (noting that a prosecution service's functions are "authorized by law[,] although also implying that the prosecution service's core role in instituting prosecutions and its "active role in criminal proceedings" are givens, not ultimately subject to legislative fiat). South Africa's Parliament has enacted legislation on performance measures that should create the environment for more effective oversight and increased accountability (although, as noted, Parliament's oversight has not necessarily been effective).

161 Cf. Council of Europe Rec. 2000/19, Rec. 4 (noting an obligation on the budgetary authority to ensure adequate material means to the prosecution service consistent with its functions).

162 In 2004 Bulgaria's legislature obliged the Prosecution Service to supply an annual report, for example. It is not clear that annual reports necessarily act as an effective mechanism of accountability and control, however; in Hungary, for example, the Prosecutor General must give a report to Parliament on the performance of the Prosecution Service, but the form and content of the report are ill-defined (and defined by the Service itself), and since 1990 only one annual report has been examined, discussed, and approved by Parliament. There are no clear instances in the countries surveyed in which the annual report is seen as a particularly important means of accountability, rather than routine obligation.

163 As noted, owing at least in part to the high level of autonomy afforded the magistracy, the Supreme Judicial Council, which has formal oversight, has demonstrated a low level of responsiveness to public concerns about the effectiveness of prosecution services.

164 This pattern has been visible especially in matters of sentencing in the United States, where legislatures have introduced sentencing guidelines to curb judicial discretion—although these in turn have been criticized for producing rigid and unjust results. See, e.g., Jon Wool and Don Stemen, "Aggravated Sentencing: *Blakely v. Washington*—Practical Implications for State Sentencing Systems," at [www.vera.org](http://www.vera.org).



There are few clear red lines in this continuum. The clearest consensus from state practice and the standards might be that legislative involvement in prosecutorial decision-making becomes progressively more problematic as it moves on a continuum from regularized, routine interventions (such as the annual budget process or occasional legislative reforms) towards *ad hoc* intervention in response to (or anticipation of) individual actions by prosecutors, or as it moves from seeking information about completed cases towards giving instructions in pending cases.<sup>165</sup>

In any event, legislative interventions in the prosecutorial process must themselves be consistent with standards on neutrality; that is, neutrality is not one of the policies or goals that may be adopted, altered, or abandoned by the legislature, like the criminalization of a particular act, but rather a process norm essential to the very operation of a prosecution service as such.

Some systems also provide institutionalized channels to ensure prosecutorial involvement in the legislative process. In Italy, for example, the Superior Council of the Magistracy, the self-governing body of the judiciary, may participate in legislative proceedings concerning justice or the judiciary.

#### 4.3. Relations with the executive

Traditionally, many prosecution services have been under the direct control of executive branch agencies or the government, despite the frequent theoretical identification of prosecutors as judicial officers. Thus the principal threat to prosecutorial independence in most states has been seen to come from the executive, rather than, say, the legislature, and international standards focus more on the executive than the legislature; nonetheless, it is clear that extensive executive control of the prosecution service is fully anticipated by and entirely consistent with international standards.<sup>166</sup>

In practice, executive influence over the prosecution service varies widely. In some states, the executive has considerable direct influence (England and Wales, France, Germany, South Africa), including over the career path of prosecutors and the budget of the service. Often Ministers of Justice have the authority to issue general policy instructions (France, Germany, South Africa), or even instructions in particular cas-

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165 A recent constitutional court case in Hungary clarified that parliamentary interpellations could not in any way affect the status of the Prosecutor General, even when parliament specifically voted to reject the Prosecutor General's response; the Court viewed this as an element of the prosecution's political independence from the legislature. 3/2004 (II.17) AB, Decision of the Constitutional Court of Hungary: *Az Alkotmánybíróság határozata a legfőbb ügyésznek az Alkotmány értelmezése tárgyában előterjesztett indítványára* [Decision of the Constitutional Court on the Prosecutor General's Motion Regarding the Interpretation of the Constitution]. Cf. Council of Europe Rec. 2000/19, Rec. 11 ("States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. However, the public prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out[]").

166 See, e.g., Council of Europe Rec. 2000/19, Recs. 11-16 (section entitled "Relationship between public prosecutors and the executive and legislative powers").

es (England and Wales,<sup>167</sup> France,<sup>168</sup> Germany<sup>169</sup>). In South Africa, for example, executive (both ministerial and presidential) control of the prosecution service extends to appointments, management, and general strategy, and even to ordering reports on high profile cases or contentious issues. At the opposite end of the spectrum, in Chile, Hungary, and the United States (at the county level<sup>170</sup>) the executive has very limited authority over the highly independent prosecution services.

Even when direct or formal influence is limited, the executive may have considerable informal resources for influence. In Bulgaria, the Minister of Justice has very limited formal influence over the prosecution's management, yet the government's involvement in the budgeting and legislative processes gives it considerable informal influence over prosecution activity. The Bulgarian executive's lack of formal authority to give policy instruction has been the source of constant tension in its relations with the prosecution services, with the government complaining that it is prevented from influencing policy and setting priorities in the fight against crime, while the Prosecution Service complains of a lack of cooperation.<sup>171</sup>

In several countries, the Minister of Justice retains a coordinating (Chile, Italy) or supervising (France, South Africa) role, especially in the prosecution's relationship to the legislature.<sup>172</sup> It is common that the prosecution service has to report to executive agencies (South Africa, Germany), even if this is purely informational (Chile), and some Ministries engage in ongoing discussions or conferences with the prosecution services that in effect act as instructive policy guidance (France,<sup>173</sup> Germany, South Africa). It is also common that members of the executive have an *ex officio* role in supervisory or coordinating bodies that administer or monitor the prosecution service (France—Superior Council of the Magistracy; Chile—Coordinating Committee for Reform).

167 Certain prosecutions require the express approval (*fiat*) of the Attorney General, who also has the power to terminate prosecutions (*nolle prosequi*), although in general, prosecutors are independent in making decisions relating to criminal proceedings.

168 The Minister of Justice can instruct the Prosecutor General of the Court of Appeals in writing to institute and reopen proceedings concerning any offense; however, the Minister cannot order proceedings to be dropped or dictate the particular course of a specific investigation.

169 There have been only a few isolated cases of a Minister providing mandatory instructions to a Prosecutor General, and no known cases of abuse for political reasons—in part a product, perhaps, of strong democratic traditions and the public's high level of sensitivity towards any abuse of power.

170 At the federal level, there is considerable and direct control by the executive.

171 The relationship between Bulgaria's Prosecution Service and political branches is marked by the Service's problematic political role, a result of its extreme independence: The Service has become a political factor in its own right, building cooperation with or confronting politicians, including members of Parliament and the executive. Some politicians reportedly do not dare confront the Service publicly, as a criminal investigation against a politician—announced publicly by the Prosecution Service—can be very damaging to a political career, and the Prosecution Service has abused its power in this way.

172 As noted above, in several countries (France, Germany, Italy), the legislature may only solicit information on the prosecution service through the office of the Minister of Justice, giving the executive additional leverage vis-à-vis both parties.

173 In France, the Ministry of Justice holds frequent conferences with the *Parquet*, which regularly provides information to the Ministry's Directorate in charge of criminal cases (*Directeur des affaires criminelles et des grâces*) about cases that have attracted the interest of the media; in turn, the Ministry uses this information in drafting its instructions and circulars.

What practice in the countries surveyed shows in common—and what is confirmed by the standards—is an aim to limit executive authority in two principal ways: authority should be transparent, and it should be regularized—that is, it should disfavor case-specific supervision. States should clearly define, in law, the scope of the executive's authority,<sup>174</sup> which the executive should exercise transparently<sup>175</sup> in consultation with the prosecution itself.<sup>176</sup> Instructions not to prosecute in a given case are disfavored in the standards, which nonetheless recognize that there is no absolute prohibition on such powers;<sup>177</sup> indeed, in some states the executive retains explicit powers of intervention,<sup>178</sup> while in others the hierarchical nature of the prosecution's relationship to the executive implies such instructions (South Africa's executive regularly discusses individual cases with the National Director of Prosecutions).

These limits on executive authority are largely negative; they do not identify any affirmative or discretionary power in the prosecution service to compel the executive to act.<sup>179</sup> International standards suggest that prosecution services should actively cooperate with executive agencies with an eye towards promoting effective and fair crime policy.<sup>180</sup>

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174 Council of Europe Rec. 2000/19, Rec. 13(a) ("Where the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that. . .the nature and the scope of the powers of the government with respect to the public prosecution are established by law[>"). Even in countries in which the prosecution service is independent of the executive, the standards call for that independence to be clearly established in law. Council of Europe Rec. 2000/19, Rec. 14.

175 Council of Europe Rec. 2000/19, Rec. 13(d)(also noting, at second sub-para., an obligation to transmit instructions "through hierarchical channels"). The executive should publish any instructions it gives the service. Council of Europe Rec. 2000/19, Rec. 13(b)-(c), and (d)(second sub-para.)(obliging the executive to explain any written instructions that deviate from the prosecution's own advice to the executive).

176 Council of Europe Rec. 2000/19, Rec. 13(d)(first sub-para.). This can implicitly position the legislature as arbiter or mediator between the executive and the prosecution service, even when the latter is formally subordinated to the former.

177 Council of Europe Rec. 2000/19, Rec. 13(f)(saying "such instructions must remain exceptional and be subjected. . .to an appropriate specific control with a view in particular to guaranteeing transparency["); see also IAP Standards, Std. 2.3.

178 These powers are often the source of friction between the political branches and the prosecution service proper. In Germany, representatives of the Prosecution Services have been arguing for many years, unsuccessfully but persistently, for the abolition of the Ministers' power to issue instructions in individual cases.

179 Council of Europe Rec. 2000/19, Rec. 12 ("Public prosecutors should not interfere with the competence of the. . .executive powers[>"). One specifically reserved authority is for the prosecution to be able to investigate offenses by executive officials, whether or not the service itself is formally independent. See UN Guidelines, Art. 15 ("Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences["); Council of Europe Rec. 2000/19, Rec. 16 (saying that prosecutors "should be in a position to prosecute [such officials] without obstruction").

180 Council of Europe Rec. 2000/19, Rec. 15. In preparing draft legislation on behalf of the Government in Hungary, the Ministry of Justice must invite comments and the opinion of the Prosecutor General's office; conversely, the Prosecutor General may initiate legislation, but only through the Minister of Justice.

#### 4.4. Relations with the police and other investigative organs

In most civil law countries, the prosecution service tends to have a supervisory (Chile, France, Germany, Hungary) or coordinating role in relation to the investigative function vested in the police. In some states, this relationship is with the police in general, while in others (Bulgaria,<sup>181</sup> France, Italy), there are special parts of the general police forces that are in effect permanently at the disposal of the prosecution service.

Although the constitutional or institutional arrangements for the police and prosecution services are clearly separate—in all countries surveyed the police have a separate administrative identity, including bureaucracies, budgeting, and career paths that are separate—the formal functional arrangement tends to give prosecutors the dominant position,<sup>182</sup> at least insofar as they are willing and able to assert ongoing supervision. Where civil law prosecutors do not exercise active, ongoing oversight,<sup>183</sup> police tend to become increasingly powerful in the relationship, engaging in low-level *de facto* decision-making about investigation and cases.<sup>184</sup> In any event, the apparent institutional differences are often somewhat less in practice; in fact, the better indicator of when the prosecution will in fact have a leading role in investigation is probably the gravity of the crime, rather than any structural indicators (France).<sup>185</sup>

In common law countries, prosecutors' formal authority over the police is far less—in England and Wales, for example, the Crown Prosecution Service has no authority over police in any context—but at the same time, prosecutors have greater discretion over which cases to pursue once the police have completed their investigations (Eng-

181 Bulgaria formerly had a separate investigation service. However, in 2006 this was largely subsumed in the police, who are subordinated to prosecutors in their investigatory work. Investigators now only handle limited classes of cases, such as those involving Police officers or people with prosecutorial immunity.

182 In Germany, for example, the prosecution service is formally identified as the master of pre-trial proceedings, including investigation.

183 Prosecutors often have discretion about whether they will directly supervise an investigation themselves or delegate it to the police. Thus in France, a prosecutor (or an examining magistrate) may delegate a large number of investigative actions to the judicial police by letters rogatory (*commissions rogatoires*), allowing them to conduct investigative actions without undue delay, but also in practice conferring significant power on them; nonetheless, the prosecutor or the examining judge retains formal control over the investigation.

184 This appears to be the case in Germany, for example, where prosecutors rarely participate in investigation, and the police have considerably more investigative resources at their disposal. In Chile, the police are formally an “auxiliary” to the *Ministerio Público*, and prosecutors can “directly exercise the functions of investigation” as well as instruct the police. In practice, however, most investigative work is completed by the time a prosecutor is apprised of a case, as the police are obliged to undertake swift action upon receipt of a complaint. In cases with few leads, prosecutors merely formalize the absence of evidence or the possibility of proceeding with an administrative decision to suspend work.

185 In France, for example, the judicial police have powers to conduct limited investigations on their own, but these generally concern lesser offenses or the preliminary stages of more serious investigations.

land and Wales,<sup>186</sup> United States<sup>187</sup>); the mixed South African system generally follows this model as well, although—consistent with the more common pattern in civil law systems—prosecutors retain authority to direct police officers’ work in relation to specific investigations.<sup>188</sup> The result, in general terms, is that prosecution services and police forces have developed extensive contacts and working relationships; prosecutors need competent investigations in order to prosecute successfully, while police want their cases prosecuted. Still, there is often tension between these agencies.<sup>189</sup>

Likewise, many civil law jurisdictions report roughly similar problems with coordination between police and prosecutors, as well as professional tension between the two groups. Although in systems employing the legality principle neither police nor prosecutors have discretion in dropping or pursuing cases—which theoretically should reduce opportunities for disagreement—frictions between prosecutors and police often also undermine interdepartmental cooperation and effectiveness.

Indeed, the relationship between police and prosecutors seems an example of how different constitutional, institutional, and functional structures must be considered comprehensively, not in isolation. The greater discretion afforded prosecutors in common law countries has traditionally co-existed with an equally independent police force possessed of considerable discretion, and a powerful, autonomous judiciary—different and competing discretionary authorities acting as multiple gatekeepers and checks on the actions of independent actors below.<sup>190</sup> In civil law systems, by contrast, there has traditionally been less need for independent review of acts that were not discretionary in nature—instead, the stricter requirement of legality has often been sufficient to ensure the integrity of the process.

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186 Although an entirely separate institution, the Crown Prosecution Service was established in part to provide an impartial evaluation of investigations by the police, whose own powers had been increased; thus even in this common law system, the sense clearly exists that the prosecution is to exercise a kind of monitoring role over police investigations.

187 Police forces in the United States are organized into very many, extremely autonomous, and often overlapping jurisdictions; with few exceptions, prosecution services have no authority whatsoever over them, although they often have extensively coordinated working relationships; coordinated working groups of law enforcement, investigative, and prosecuting agencies are quite common.

188 Directors of National Prosecuting Authority offices at the seat of a High Court may “give written directions or furnish guidelines” to the Provincial Commissioner of Police or any police officer conducting investigations into offenses in the Director’s area of jurisdiction (National Prosecuting Authority Act 32/1998, Sec. 24(4)(c)), and can “supervise, direct and co-ordinate specific investigations” by the police in their area (National Prosecuting Authority Act 32/1998, Sec. 24(1)(c)). The prosecution service also has its own investigative units, focused on organized crime or areas designated by the President, and with most of the same procedural powers as police investigators, and certain enhanced powers in relation to search and seizure.

189 In the United States, this endemic tension may be particularly exacerbated at election time, as policy differences between the independent District Attorney and the executive branch, of which the police are a part, may create polarization. (In many counties the chief law enforcement officer, the sheriff, is also an elected official).

190 Although the police have no obligation to consult with the Crown Prosecution Service, in practice this is quite frequent, and prosecution requests for further investigation are rarely rejected, especially as the prosecution has discretion to continue with a case or not. Prosecutors have been placed in police stations in order to give early and immediate advice; for out-of-hours consultation, a telephone advice service known as CPS Direct has been established with a single national number, which any police force can use when it requires urgent advice. In general, the prosecution has tended to become involved at a much earlier stage in the charging process.

International standards reflect this major division, developing approaches that account for either an equal and independent or a hierarchical relationship between prosecution and police.<sup>191</sup> In systems in which the police are subordinated, the prosecution should be able to instruct the police in the conduct, staffing, and prioritization of investigation and the release of information to the public.<sup>192</sup> In systems with independent police, the state ought nonetheless ensure “appropriate and functional co-operation[.]”<sup>193</sup> In either relationship, the prosecution should have the authority to ensure the legality of police investigative behavior, as a function of its general authority to bring criminal charges,<sup>194</sup> which inevitably gives prosecution services at least some marginal leverage over the police.

The aspiration that prosecution services ought to be able to instruct police “with a view to an effective implementation of crime policy priorities”<sup>195</sup> seems inconsistent with the view, held in certain prosecution services (such as in Chile), that the prosecution service is not responsible for or involved with crime policy. Yet it seems logical that the prosecution should have an interest in crime policy if it has supervisory authority over the police, assuming the police are thought to be involved with implementing crime policy (which is universally the case).

#### 4.5. Relations with the judiciary

There are two principal variants in the relationship of prosecutors to judges: either prosecutors are considered members of the judiciary (being called, together with judges, “magistrates”), or they are a separate service, whether entirely autonomous or within the executive. In Bulgaria, France, and Italy, prosecutors and judges share a common administrative body, while in other countries (such as Chile, England and Wales, and Hungary), they are entirely separate;<sup>196</sup> in South Africa, the two institutions are considered separate, although they share some administrative and support services.<sup>197</sup> In Germany prosecutors and judges are under the supervision of the Minister of Justice, but the administration of the two institutions is largely kept separate.

The international standards appear to contemplate a formal and functional division—a “strict separation”<sup>198</sup>—which is much greater than actual practice in states

191 See generally Council of Europe Rec. 2000/19, Rec. 21-23 (section entitled “Relationship between public prosecutors and the police”).

192 Council of Europe Rec. 2000/19, Rec. 22(a)-(b).

193 Council of Europe Rec. 2000/19, Rec. 23. See also UN Guidelines, Art. 20 (“In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police. . .”).

194 Cf. UN Guidelines, Art. 15-16; Council of Europe Rec. 2000/19, Rec. 21. This logically is a general standard, applicable even in those systems that do not expressly assign the prosecution service the role of “ensuring the legality of administrative actions.”

195 Council of Europe Rec. 2000/19, Rec. 22(a).

196 In the United States, many judges at the state and local level are directly elected.

197 In some German states, too, the state Supreme Court and the Prosecutor General’s office may share administrative staff and costs.

198 UN Guidelines, Art. 10 (“The office of prosecutors shall be strictly separated from judicial functions[.]”); Council of Europe Rec. 2000/19, Rec. 17 (“[S]tates should guarantee that a person cannot at the same time perform duties as a public prosecutor and as a court judge[.]”).



that consider prosecutors to be judicial officers. The close professional interconnections in these joint governance structures can raise concerns about potential risks to the independence of both judges and prosecutors. In Bulgaria, for example, the joint management of magistrates has not been considered successful and has created substantial tensions between judges and prosecutors, leading to a rather difficult working environment for the Council and reducing its efficiency.<sup>199</sup>

Even in those states with a common magistracy, however, the notional common identity of judges and prosecutors is tempered by internal institutional divisions ensuring each body of judicial officers some autonomy. In France, for example, the common Superior Council of the Magistracy has separate panels for judges and prosecutors, such that most administrative decisions are in fact made by a body in which prosecutors or judges respectively are a decisive majority—in effect, a largely self-governing body within the larger common administrative structure. In the French context, the magistracy is not seen as dangerously co-mingling prosecutors and judges, but rather ensuring that the two groups have equal status: the fact that judges and prosecutors share magistracy status implies a level of professional equality rather than hierarchical subordination,<sup>200</sup> which in turn may tend to reinforce the independence and autonomy of prosecutors.

On the other hand, even when judges and prosecutors are clearly institutionally separate, there are often close professional and career path relationships between judges and prosecutors. In many states, judges and prosecutors have identical initial training (Italy and Hungary<sup>201</sup>), and can change from one career path to the other (Hungary,<sup>202</sup> France, Germany,<sup>203</sup> Italy<sup>204</sup>), although it is more common for prosecutors to become judges than the reverse.<sup>205</sup> International standards actually call for states

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199 This is in part a function of the high levels of independence afforded to magistrates in Bulgaria: Even in the face of mounting public criticism, the Supreme Judicial Council felt no pressure to exercise meaningful control or pursue policies to guarantee non-corrupt, effective criminal investigation and prosecution. Instead, a culture of nepotism and institutional loyalties became evident in the work of the Council.

200 Judges in France cannot give instructions to prosecutors (other than as pertain to courtroom process), nor vice versa.

201 However, training for judges and prosecutors is organized separately.

202 This rarely occurs, however.

203 In several southern German states, judges and prosecutors are required to move regularly back and forth between prosecutorial and judicial offices, even at the highest levels of both professions. Promotions depend on familiarity with both career paths. Judges and prosecutors generally enjoy close social and professional contacts.

204 In Italy, the former provision barring magistrates from switching between prosecutorial and judicial positions after five years of service has recently been abolished; now the only restriction is that such changes can occur no more than four times during each magistrate's service, and that, in such cases, the magistrate must move to a court or prosecution office situated in a different location.

205 This is especially the case in common law systems, where judges traditionally have high social status. In England and Wales, for instance, where in practice only lawyers with current experience in the higher courts are eligible for judgeships, prosecutors—with their limited rights of audience—are far less likely to become judges than are defense solicitors. Judges themselves seldom apply to become prosecutors, as prosecutors enjoy lower social and professional status and lower pay. This is also true in Chile, where judges tend to be considerably older than prosecutors and the prestige of the new *Ministerio* has yet to equal the cultural authority of judges.

that allow switches in career path to facilitate this process<sup>206</sup>—presumably to ensure that prosecutors have real career parity with judges, as in practice few judges tend to become prosecutors in either civil or common law countries. Some jurisdictions attempt to create status equivalence between judges and prosecutors, for example by ensuring their salaries are equal (France, Germany,<sup>207</sup> Italy).

Yet there are patterned differences in the level of autonomy and the direction of control between judges and prosecutors, even across different types of system. In both principal types of system, prosecutors are officers of the court with certain professional obligations<sup>208</sup> that may, in practice, give judges power over them during proceedings, in a manner that can indirectly but meaningfully affect prosecutorial decision-making.<sup>209</sup> More generally, prosecutors have obligations towards judges and the courts that are not reciprocal.<sup>210</sup> Regardless of similarities in training, salary, or administration, in most countries that do not have a magistracy system judges have greater prestige than prosecutors—in common law systems such as England and Wales or the United States, this imbalance is considerable, and judges have very high status.<sup>211</sup> Where the prosecution service and the judiciary have different levels of independence, it is invariably the prosecution that has less independence—especially individual prosecutors—not the judiciary or individual judges,<sup>212</sup> and judges' greater measure of core independence tends to place judges in a marginally more secure and powerful position than prosecutors occupy.

206 Council of Europe Rec. 2000/19, Rec. 18 (“[I]f the legal system so permits, states should take measures in order to make it possible for the same person to perform successively the functions of public prosecutor and those of judge or vice versa[.]”).

207 Salary equivalence is found even in countries, such as Germany, that clearly do not identify judges and prosecutors as belonging to a single corporate body.

208 Cf. Council of Europe Rec. 2000/19, Rec. 20 (“Public prosecutors must be objective and fair during court proceedings. In particular, they should ensure that the court is provided with all relevant facts and legal arguments necessary for the fair administration of justice[.]”).

209 In Chile, despite the formal independence of the *Ministerio Público*, the judiciary has considerable power to shape the *Ministerio* and the conduct of prosecutions: the Supreme Court plays an important role in selecting the *Fiscal Nacional*; judges also routinely chastise prosecutors in court for shortcomings in their work. The relationship between the judiciary and the *Ministerio* is at times strained. Cf. ICC Draft Code of Professional Conduct for Prosecutors, Preamble (final para.) (noting that the Code is to be promulgated by the Presidency of the Court, the judiciary organ).

210 Cf. Council of Europe Rec. 2000/19, Rec. 17 (“States should take appropriate measures to ensure that the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges[.]”), and 19 (“Public prosecutors must strictly respect the independence and the impartiality of judges; in particular they shall neither cast doubts on judicial decisions nor hinder their execution, save where exercising their rights of appeal or invoking some other declaratory procedure[.]”); UN Guidelines, Art. 20 (“In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with. . .the courts, the legal profession, [and] public defenders. . .”).

211 This is also true of South Africa, where judicial officers have greater prestige than all but the most senior members of the prosecution service. Judicial officers generally receive higher salaries than prosecutors, and appointments to the judiciary are made from the ranks of senior private attorneys and from among magistrates of lower courts, who in turn are often appointed from among prosecutors.

212 Cf. EUMAP, *Monitoring the European Union Accession Process: Judicial Independence* (Budapest: Open Society Institute 2001), at 16-32 and especially 28 (discussing standards of judicial independence).



Most explanations of why prosecutorial and judicial independence differ are circular: prosecutors have less independence because of the hierarchical nature of the prosecution service. This only begs the question of why prosecution services are structured that way. Rather, the functional difference between the role of the prosecutor as initiator and the judge as final arbiter suggests the basis for these different levels of independence, especially individual independence. This functional difference also tracks closely with the tendency for judges to have somewhat higher status, as they are in a position to adjudicate the decisions of prosecutors, and not the reverse.

There is not a clear minimum quantum of independence for individual prosecutors, and consequently joint administration (or other functional conflation of judicial and prosecutorial roles) probably poses more serious and immediate risks to society's interest in the independence of judges than that of prosecutors. The point, however, is that any conflation of the initiating and adjudicating role creates risks for society as a whole; prosecutors may not have an absolute claim to independence, but it is bad principle and bad policy to allow them to be either subordinated to, or overly identified with, the very judges with whom they must work.<sup>213</sup>

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## V. Information Control concerning the Prosecution Service's Activity

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*This section considers the restrictions and obligations under which the prosecution service operates, as well as the rules under which the general public, and especially the media, has access to information about the work of the prosecution service. Only a few restrictions on the transparency of information or decision-making are justified; in most instances, other institutional actors, the media, and the general public have legitimate interests in getting information about the prosecution service's activities—and such access improves the service's effectiveness and efficiency. The default standard should be towards openness.*

*Information restrictions and obligations:* There are limited circumstances in which a prosecution service may legitimately be allowed or even obliged to restrict the free flow of information concerning its activities. Prosecutors' responsibilities to the court and to the rights of defendants may require them to restrict their approaches to media and the general public.<sup>214</sup> In addition, prosecution services may have legiti-

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213 Certainly, there are risks to judges' independence as well from insufficiently regulated interaction with prosecutors, and consequently risks to defendants and to society's general interest in independent, impartial adjudication.

214 See, e.g., ICC Draft Code, Art. 17 ('Publicity and the Media'):  
Prosecutors shall :

1. Avoid making public comments outside the courtroom, including, inter alia, speaking to the media about the merits of particular cases or the guilt or innocence of certain accused before judgment by the Court, and making any public statements regarding the character, credibility, reputation, or record of an accused;

mate reasons to restrict the flow of information about individual investigations and cases, or even, in certain circumstances, about broader prosecution strategy (such as in cases of long-term organized crime or terrorism investigations). There may also be legitimate reasons to restrict information about *ongoing* internal disciplinary proceedings.

However, there are probably only very few necessary or mandatory restrictions on the transparency of information or decision-making beyond these limited areas. Moreover, access improves the service's effectiveness and efficiency. Other branches of the state, media, and individual citizens have legitimate interests in securing access to information about the prosecution service's activities.<sup>215</sup> There is no reason to believe that general strategy, budgeting, personnel decisions, and the like need to be subject to broad information restrictions. Prosecutors' obligations as officers of the court likewise can require them to disclose information even if (particularly if) it is harmful to their case.<sup>216</sup> Arguably, international norms concerning accountability suggest that the default should be towards informational openness;<sup>217</sup> it is not proper to expansively interpret a duty of discretion—whose purpose is to protect the well-being and reputation of individuals and the general social interest in effective investigative and judicial proceedings—so as to achieve strategic advantage in particular cases or to advance preferential institutional interests.

All states place some restrictions on the prosecution service's ability to disseminate information. In Hungary, there is no general right of public access to investigative information; detailed regulations govern the Prosecution Service's interactions with the media and the general public. The authority actually conducting an investigation (including the Prosecutorial Investigation Offices) decides which data may be made public and which kept confidential, and prosecutors supervising an investigation are not allowed to inform the public about the details of the investigation, the actual activity and results, or the plans of the investigative authority.<sup>218</sup> Media access to on-

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2. Make it clear, particularly when undertaking official speaking engagements, that he or she is representing the [Office of the Prosecutor] and not the Court as a whole.

See UN Guidelines, Art. 13(c) ("In the performance of their duties, prosecutors shall: . . . [k]eep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise[]"); Council of Europe Rec. 2000/19, Rec. 30 ("Public prosecutors should keep confidential information obtained from third parties, in particular where the presumption of innocence is at stake, unless disclosure is required in the interest of justice or by law[]") and 32 ("Public prosecutors should take proper account of the interests of the witnesses, especially take or promote measures to protect their life, safety and privacy[]").

215 French citizens have the right to information about the operation of judicial bodies; all German government agencies are under an obligation to provide full information to the media.

216 Council of Europe Rec. 2000/19, Rec. 29 ("Public prosecutors should seek to safeguard the principle of equality of arms, in particular by disclosing to the other parties—save where otherwise provided in the law—any information which they possess which may affect the justice of the proceedings[]"). Arguably, prosecutors in systems governed by the principle of legality have even less formal discretion about withholding information.

217 See, e.g., Council of Europe Rec. 2000/19, Rec. 36(c) ("The public must be informed of the [prosecution service's] organisation, guidelines, principles and criteria; they shall be communicated to any person on request[]").

218 The supervising prosecution office limits information issued in such instances to the details of strictly prosecutorial activity, such as decisions on complaints against measures taken by the investigative authority or interpretation of the laws involved in the case.

going proceedings in South Africa is limited by the National Prosecuting Authority's confidentiality obligations: It is a criminal offense for prosecutors to disclose information acquired in the performance of their official duties without the permission of the National Director or the written authorization of the affected person. These restrictions are typical; even states that declare a general right to information (France) in fact have similar restrictions.

States also place informational obligations on the prosecution services, usually with regard to reporting their activity to other state institutions. Certain states oblige the prosecution service to supply information to the political branches or to autonomous governing bodies, either on a scheduled basis, such as an annual report (Chile<sup>219</sup>), or in response to particular interpellations (Hungary<sup>220</sup>).

*Media access:* Other systems include formal (Germany<sup>221</sup>) or background (United States<sup>222</sup>) norms obliging prosecution services to provide information to the general public or to media. Since 2004, Bulgaria's Supreme Judicial Council has had an obligation to make public most of its sessions as well as most reports submitted to it, and after initial resistance, it installed video cameras of its deliberations and normally holds open sessions.

At the same time, some systems place restrictions on media reporting of ongoing cases (England and Wales, France, Germany), or even more specifically on reporting of the prosecution service's strategy and activities. Such restrictions, if too extensive, potentially conflict with human rights norms on freedom of information and the media, but in principle and practice it is entirely possible to balance media freedoms with the need for effective prosecutions and defendants' rights to privacy and a fair trial.

Providing access to information concerning prosecution services' budgeting, planning, strategy, and performance is in and of itself a means of ensuring transparency and accountability. Requirements to report to other branches of the state—even if accompanied by a right of interpellation—do not necessarily violate principles of independence and neutrality, so long as the service's decisional autonomy is not directly restricted.<sup>223</sup> And, so long as protections for the rights and reputations of individuals are considered, there is little evidence—or reason to suppose—that increasing media access does anything but advance the general social interest in the administration of justice.<sup>224</sup> Moreover, the risks that can arise from media access are probably a func-

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219 Three reports have been issued to date under the new system. Read out loud in person by the *Fiscal Nacional*, the report is a long narrative account of legal developments; it contains few meaningful statistical indicators concerning practices or the outcomes of its work.

220 This is a good example of non-controlling transparency: the Prosecution Service is required to respond to Parliamentary interpellations, but Parliament may not refuse to accept the answers.

221 The Prosecution bears the burden of justifying any withholding of information.

222 These rules are usually contained in ethics codes rather than statutes.

223 The effects of publicity and public pressure consequent on such scrutiny do not, under most circumstances, constitute improper interference with prosecutorial independence, so long as the formal right of independent action is retained.

224 In Germany, for instance, there is no evidence that the media unduly influences prosecutorial decisions, at least directly. No cases have been reported of prosecutors altering their decisions because of media attention, in part, perhaps, because of the strong sense of professionalism in the Prosecution Service. However, media reporting can influence the atmosphere in more subtle ways. Exten-

tion of interaction with other institutional arrangements more than a problem of access itself.<sup>225</sup>

Information controls may also place obligations on other actors and may serve to protect the service's autonomy and effectiveness. In addition to media reporting restrictions, for example, the requirement that the executive put any instructions to the prosecution in writing<sup>226</sup> is a form of information control aiming to ensure transparency, which both protects against improper political influence and regularizes accountability.<sup>227</sup> In addition, restrictions on using illegally obtained evidence<sup>228</sup> likewise serve to discourage improper behavior by investigative authorities.

*Public relations:* Apart from questions of obligation and propriety, prosecution services can disseminate information in ways that improve their institutional ability to realize the goals society has assigned them. Yet few prosecution services have effective information and outreach services.<sup>229</sup> In France, for example, the Minister of Justice develops policy regarding media access and public information, but the *Parquet's* own informational outreach is not well developed; there is no specialized unit to support the *Parquet's* relations with the media, and the level of attention given to publicizing information varies considerably among its different offices. In South Africa, the National Prosecuting Authority has a dedicated section for communications, but there are no public or media relations sections outside of the head office; instead the various offices and the separate units within liaise with the media relations section at the head office, and—for the reasons noted above concerning confidentiality of information—individual prosecutors are supposed to refrain from making media statements or comments.

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sive reporting on a case, for example, can lead to harsher treatment of the suspect. The media can also take on a positive role in guarding the Prosecution from undue political influence; when the media suspect such interference, they generally take the side of the Prosecution. The evidence from England and Wales—which has one of the most robust media cultures—is similar.

225 For example, in the United States the status of chief prosecutors as directly elected political officials can lead to efforts by District Attorneys to cater to popular preferences, including in pursuing particular cases, in ways that may affect the impartial and regularized administration of justice. But this, properly understood, is not a function of media access, but rather of the direct election of prosecutors.

226 Council of Europe Rec. 2000/19, Rec. 13(c)-(d).

227 This is an example of how independence and accountability are complementary rather than contradictory values.

228 UN Guidelines, Art. 16; Council of Europe Rec. 2000/19, Rec. 28.

229 The United States and England and Wales constitute exceptions. As elected officials, District Attorneys in the United States generally have strong incentives to ensure that the work of their offices is well (and positively) publicized and responsive to the interests of other actors, especially of important constituencies. Many offices engage with the public through a range of outreach activities that focus on crime prevention and reduction as well as general public education about the law. In England and Wales, the Crown Prosecution Service has a large, professional press office at its headquarters, which deals with press inquiries about individual cases and about the CPS in general, as well as regional liaisons (who are, however, usually prosecutors rather than professional spokesmen). In part this is a response to the strong tradition of a free and active press in the United Kingdom; criminal cases are routinely reported in all newspapers, and press criticism undoubtedly puts pressure on prosecutors. Although extremes of public pressure might create the potential for interference with the independence of decision-making, there is no evidence of this being a concern in the English and Welsh context. In Germany, all prosecution offices have a press officer, although in smaller offices this may be the Chief Prosecutor. In Bulgaria, some prosecution offices have begun to appoint spokesmen.

In Chile, public relations—shaping and responding to public expectations—is perhaps the weakest aspect of the *Ministerio Público*. The *Ministerio* has a national Department of Communications; it issues a quarterly journal containing new jurisprudence and essays by senior staff, as well as educational brochures and videos on how the new system of justice operates. However, the Department remains a primarily reactive organization, and the position of Director of Communications has changed hands several times.<sup>230</sup> It is nearly impossible to gauge public perception of the *Ministerio*'s work, as there are no national studies of attitudes toward the reform process in general or the *Ministerio* in particular.

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## VI. The Use of Statistics

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*This section considers how prosecution services and other institutional actors use statistics in measuring the performance of the service and determining its priorities. Proper selection of statistical indicators is not a technical exercise, but a function of social and political consensus about the role of the prosecution service; at present, however, few of the states surveyed make effective use of statistics to evaluate and improve the prosecution service's ability to meet social goals.*

There is no general or direct obligation on prosecution services to maintain statistics or other performance measures of any, or any particular, kind. At most, one might derive an ancillary obligation to measure performance so as to ensure that the service is indeed fulfilling its core obligations,<sup>231</sup> but even this would provide practically no guidance about specific measures.

The statistical evaluation of most prosecution services' performance is at a primitive stage. While all states collect statistics of some kind, most do not collect data that reflect a broad range of questions and concerns about what the prosecution service is supposed to achieve; instead, most governments collect and analyze data that focuses on outputs, not outcomes. Indeed, it is nearly impossible in any country to describe patterns in the administration of justice in meaningful terms on the basis of data collected and reported by state institutions.

In general, the countries surveyed tend to keep statistics on incidence of crime and on cases at various docket stages; fewer keep (or publicize) statistics on more qualitative measures of performance or on internal processes (such as those relating to

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<sup>230</sup> At the regional and local levels, by contrast, innovative practices have been adopted in communications and public relations. Many of the Regional Directors of Prosecution have used one of their two allotted advisor positions to create a press officer and mobile public relations office. Some city level prosecutors have taken further steps, without additional resources, to communicate with the public about the significance of the *Ministerio*'s work.

<sup>231</sup> Cf. *Access to Justice: The Prosecution Service*, United Nations Office on Drugs and Crime (Vienna, 2006), at 3-4.

training and evaluation).<sup>232</sup> In some systems, another agency—often in the executive—is responsible for maintaining statistical records.<sup>233</sup>

It is difficult to draw inferences about the quality of justice from such data. There is no consensus about the definition of “quality,” or about what kinds of values are worth scrutiny. In Chile, for example, statistics record the number and percentage of victims given assistance, but not why they were given such assistance, whether or not it was appropriate, or what consequences, if any, it had for the goals of criminal justice.<sup>234</sup> Data routinely collected by the prosecution service in South Africa is primarily to measure quantitative performance (such as the number of cases prosecuted) rather than indications of qualitative effect (such as improvement in public confidence in the prosecution service or in the broader criminal justice system, or decline in public fear of crime).

In many systems, statistics are either not readily accessible by policymakers and the general public, or they are not available in a useful form. In Bulgaria, statistical informational reports are submitted to the Supreme Judicial Council, but as there is no independent check on the accuracy of these reports, which derive from different institutions and are not readily comparable, the effect of such reporting on public awareness and confidence is not substantial. In the United States, detailed statistics that provide a solid overview of prosecutorial activities (including the many non-case related activities) are rarely available on the local level. Offices may publish general filing or disposition statistics for felonies and misdemeanors and provide overall conviction rates, but more detailed information is rarely published or even used internally to inform management about office and attorney performance.

In some situations, there can be legal or conceptual obstacles to effective data collection.

232 In France, surveys by the Ministry of Justice increasingly stress the ways in which cases are handled, either through prosecution in court or through other means, such as restorative justice. This includes efforts to develop an understanding of the efficiency of the prosecution service as a whole, taking into account both results achieved and the time taken to achieve them, in order to reduce undue delays. This information is then used to develop practice guidelines and determine additional support.

233 In France, each prosecution office records monthly data on the crime rate; each year, a general national directory is published with data detailing the work of judicial bodies in both civil and criminal matters. However, according to the Ministry of Justice, statistical indicators are more difficult to develop for criminal policy than for civil policy, owing to the poorer quality of statistics in the field of criminal justice and the poor harmonization of statistics from the *Parquet*, judiciary, police, and incarceration authorities.

234 In Chile, an abundance of quantitative information about the reformed justice system is available. The Research Division of the *Ministerio Público* produces quarterly unpublished reviews containing basic information about the administration of justice. These bulletins record the numbers of cases that enter and leave the system in a particular time frame, the types of cases, and the proportion of cases that have been dealt with. Substantial attention is paid in these reports to the type of disposition—for example, what proportion of cases was dismissed or provisionally archived, was resolved upon a decision of a judicial body, or culminated in a trial. However, the compendium is not designed to address the quality of justice, and it does not measure data against norms or benchmarks; it is not designed or used as a tool of assessment and accountability, and it is therefore difficult to draw conclusions from this data about the qualitative performance of the justice system.



No efforts are made in Italy to collect reliable analytical data on the effectiveness of the prosecution service and of individual prosecutors; no such data is collected in the processes of professional career evaluation. The very use of such data to evaluate the effectiveness of individual prosecutors and prosecution offices would be considered a threat to the independence of prosecutors in the application of the constitutional principle of compulsory criminal action.<sup>235</sup> Although the formal reasons for this are structural and constitutional, the effect is a reduced ability to evaluate the work of the prosecution service or hold it accountable—and with that, a likely reduction in its effectiveness and efficiency, as a low level of concern for and protection of the value of accountability is normally associated with lowered effectiveness.<sup>236</sup>

Analyzing statistics comparatively across different systems is generally too uncertain to yield confident, scientific results.<sup>237</sup> However, it is certainly possible to make meaningful *internal* assessments, and indeed this is the very purpose of keeping statistics. Logically, statistical indicators ought to measure the service's performance in fulfilling whatever tasks society has set for it, along with internal processes ancillary to those tasks. One can also use statistics to examine attributes of the system as a whole in terms of productivity—such as the speed with which prosecutors close complex cases—or to consider regional variations in implementing the goals set for the prosecution service. The proper selection of statistical indicators is therefore not simply a technical exercise; it is a function of the social and political consensus about what the role of the prosecution service ought to be.<sup>238</sup>

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235 More broadly, within the European Union there are strong objections to any data collection that might compromise the strong normative system of personal data protection.

236 A partial indication of the low level of effectiveness of Italy's prosecution service can be found in the annual reports on the administration of justice issued by the Supreme Court of Cassation. These reports consistently indicate that a very high percentage of the perpetrators of crimes remain unidentified and unpunished: some 80 percent of all reported crimes—including 95 percent of thefts, 80 percent of robberies, and 50 percent of homicides—go unsolved.

237 For example, German prosecutors' offices handle many more cases in total than other European countries, because all cases must go through the prosecutor's office. In other countries, if the identity of the perpetrator cannot be determined, a case will never leave the police; in Germany, even cases with unidentified perpetrators are sent to the prosecutor's office for review and, if necessary, further investigation. This results in Germany having a much higher rate of unsolved cases per prosecutor, but this cannot be taken to mean that the Prosecution Services are less efficient. Instead, efficiency is measured internally according to the duration of cases; still, even these statistics say nothing about the complexity of the cases involved—and the statistics are not publicized. Similarly, high rates of conviction are not reliable indicators of efficiency, especially in jurisdictions (like the United States) in which prosecutors have considerable discretion to choose which cases they will pursue and in which plea-bargaining effectively weeds out less-substantiated cases.

238 See Vera Institute of Justice, *Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector* (2003), available at [http://www.vera.org/publication\\_pdf/207\\_404.pdf](http://www.vera.org/publication_pdf/207_404.pdf).





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# Report on the Bulgarian Prosecution Service<sup>\*</sup>

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Yonko Grozev

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<sup>\*</sup> Up to date as of June 2007.



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## **I. General Issues<sup>1</sup>**

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With the adoption of a new Constitution in 1991, the Bulgarian Prosecution Service was granted a high level of autonomy by the Constitution, with neither the executive nor Parliament having any power over personnel decisions, prosecution priorities, or individual prosecutions. Those powers rested with the Prosecutor General, with some limited control given to the Supreme Judicial Council (SJC), a new body created by the Constitution to manage the careers of judges, prosecutors, and investigators (collectively considered “magistrates”).<sup>2</sup> Significant guarantees were also provided to individual prosecutors to protect their independence, such as life tenure, limited disciplinary measures, and barriers against criminal prosecution. This high level of autonomy of the prosecution service and individual guarantees were created as a means to achieve two goals: first, to protect the public from politically motivated prosecutions, and second, to guarantee the service the freedom to investigate and prosecute those in power. The unchallenged assumption was that once the Prosecution Service and individual prosecutors were left on their own, they would follow only the law and would not be influenced by political or other improper considerations and biases.

The authors of the new Constitution were not concerned with the accountability of the Prosecution Service, believing that what mattered most was the full independence of the service. As a result, no accountability mechanisms for the Prosecutor General were introduced, and accountability mechanisms for individual prosecutors on the authority of the Supreme Judicial Council remained rather weak. Over the years, this basic constitutional assumption was proved wrong. The Supreme Judicial Council proved too weak or unwilling, because of personal and institutional loyalties, to exercise any meaningful control over the Prosecution Service, while evidence of inefficiency and abuse of power mounted. As a result of the complete independence of the system, the Supreme Judicial Council felt no pressure at all, no matter how negative the public’s perception of the system, to exercise meaningful control and pursue policies that would guarantee non-corrupt, effective criminal investigation and prosecution. Instead, a culture of nepotism, institutional loyalties, and lack of respect for the public interest became dominant in the work of the Supreme Judicial

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1 In discussing the structure and role of the Prosecution Service, it is important to note that there has been little academic literature evaluating the work of the Service, and no empirical research. This is true both because the institution is highly protective of information on its activities, and because there is no academic tradition of empirical research in this area. My sources for this report include legislation, judicial decisions, newspaper articles, European Union reports, and my personal experience as a lawyer. The highly political nature of the debate over the Prosecution Service adds to the difficulty of critiquing it in a way that would be broadly accepted. However, this report has tried to incorporate generally accepted public views on the issue.

2 For detailed discussion of the SJC, see Sec. 4.5 below.

Council over the years. The first Prosecutor General elected after the adoption of the Constitution notoriously remarked that only God was above him. There were practically no disciplinary or criminal proceedings against prosecutors.

The system also failed in both its declared goals, namely prosecution of individuals in power and guaranteeing against politically motivated prosecution. Despite widespread corruption in government, few investigations or prosecutions of politicians took place, and practically no investigations or prosecutions of high-level government officials. The dominant pattern was to investigate or prosecute politicians who were no longer in positions of power, and even in those cases, prosecutions were not effective.

Not only did abuses of power go completely unsanctioned, but expectations that no political considerations would play a role in prosecution decision making, the primary goal of the new system, were proved wrong. The timing and substance of investigations and prosecutions on numerous occasions demonstrated clear political motivation, with the Prosecution Service changing its tacit alliances with parties or individual politicians depending on circumstances and personalities. The overriding purpose of such alliances from the Prosecution Service's perspective was to influence legislation, with a view to preserving prosecutorial powers and the autonomy of the service. In pursuing those goals, the service proved to be an effective political actor.

The status of prosecutors, the autonomous character of the Prosecution Service, and the need for reform began to be publicly discussed in the mid-1990s, amidst growing discontent with the service. There was, however, no general consensus on the course of the reform within the academic community or among legal professionals or politicians, beyond agreement that the criminal justice system was not functioning properly and that reform was needed. At various points, different political parties promoted reform proposals, but due to a lack of conceptual agreement, the complicated procedure for amending the Constitution, and the absence of majorities in Parliament that commanded support across the political spectrum, no major reform of the Prosecution Service took place. Instead, the political consensus was one of incremental reform, with minor amendments of the rules and powers of appointment, promotion, and disciplining of prosecutors, and some amendments to criminal procedure. The decision of the Parliamentary majority elected in 2005 to take such an approach was influenced by its belief that the problems were largely due to a defective choice of Prosecutor General. The appointment of a new Prosecutor General was forthcoming in 2006, and it was widely expected that the new person would change the institutional culture of the service. Parliament introduced procedural accountability within the criminal process. Strict time limits on the duration of investigations were set. Certain powers of the Prosecution Service within the criminal process were transferred to the courts, and judicial review of the decision not to prosecute was introduced, as well as a judicial procedure to terminate excessively lengthy criminal investigations.

The lack of any results in investigating and prosecuting corruption in government and organized crime made criminal justice reform the number one issue in the EU accession process. Reform of the criminal justice system has also been an extremely hot political issue domestically. As a result of EU pressure, three constitutional

amendments have been passed in recent years, one in 2003, one in 2006 and one in 2007. These amendments have limited the immunity of prosecutors from criminal prosecution, reformulated the powers of the Prosecution Service, amended the powers of the Minister of Justice, changed tenure rules, and created an oversight body in the Supreme Judicial Council, elected by Parliament. Numerous changes in the legislation regulating the justice system have also been adopted, aimed at establishing a more transparent Supreme Judicial Council, clear standards for the evaluation and competitive appointment and promotion of judges and prosecutors, and effective disciplinary procedures. Continuous EU pressure has also resulted in the appointment of more reform minded individuals to the Supreme Judicial Council and, most importantly, a reform minded Prosecutor General in early 2006. This has resulted in some positive developments, although it is too soon to judge their long term effect.

Most notably, a genuine process of investigation and prosecution of abuses by individual prosecutors was begun. For the first time since the establishment of the justice system in 1991, publicly announced inquiries into the work of individual prosecution offices have been carried out, with the result that some negative practices have been publicly reported and disciplinary and criminal investigations initiated against individual prosecutors.

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## **II. Structure and Organization of the Prosecution Service**

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### **2.1. Internal structure**

The institutional organization of the Prosecution Service is determined in part by the Constitution and in part by parliamentary legislation. This legislation largely replicates the basic highly-centralized organizational principles of the Prosecution Service in the communist period.<sup>3</sup>

The Prosecution Service's organizational structure mirrors the courts, with a pros-

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<sup>3</sup> Constitution of the Peoples' Republic of Bulgaria; Prosecution Service Act, St. Gaz. No. 87/1980, amended by St. Gaz. Nos. 46/1991 and 100/1992, repealed by Judicial System Act (1994). In the immediate transition period, special legislation was adopted on the Prosecution Service Act; later the Service was regulated by the Judicial System Act, St. Gaz. No. 59/1994. The current legislation describes the Prosecution Service as follows: "The Prosecution Service is unified and centralized. Every prosecutor is subordinate to the respectively higher ranking prosecutor and all of them to the Prosecutor General." Judicial System Act, Art. 112.

There has been much debate on the significance of this continuity. Critics of the current Service blame its problems on over-centralization and the power of higher-level prosecutors to intervene in individual cases. Others consider centralization to be crucial to the work of a prosecution service and fear the discrepancies decentralization would cause. The latter view has prevailed in this debate, and recent reforms have not challenged the hierarchical structure of the Prosecution Service.

ecution office attached to each court.<sup>4</sup> Following the reforms of the 1990s,<sup>5</sup> the courts were organized into a four-tier system: district trial courts (*raionni*), county courts (*okruzhni*) (these double as trial courts for some crimes, and function as appellate courts for cases tried before the district courts), appellate courts, and supreme courts—the Supreme Court of Cassation and the Supreme Administrative Court. Prosecution offices are organized in a parallel system: there are 112 district (*raionni*) prosecution offices, 28 county (*okruzhni*) prosecution offices, 5 appellate prosecution offices (*apelativni*), 5 county military prosecution offices, one appellate military prosecution office, and the Supreme Cassation Prosecution Office.<sup>6</sup> The entire Prosecution Service is headed by a Prosecutor General nominated by the Supreme Judicial Council and appointed by the President for a term of seven years.<sup>7</sup>

Prosecution offices include both administrative staff and prosecutors, but the size of different prosecution offices differs substantially, depending on the population of their respective territories. Offices at the first two levels—district and county offices—are in direct contact with police investigators and the Investigation Service. District prosecutors work predominantly with police investigators, while county prosecutors work exclusively with the Investigation Service's corresponding county office (*okruzhna sledstvena*).<sup>8</sup> As a rule, prosecutors are not specialized, although in some larger offices efforts are under way to increase efficiency through the creation of specialized units dealing with organized crime. Upon the advice of an EU-sponsored advisory team from the Prosecution Service of Bavaria, Germany, six separate units have been created within the "Investigation Department" of the Supreme Cassation Prosecution Office, three of them in response to the policy priorities "Organized Crime," "Corruption," and "Economic Crimes."<sup>9</sup> The new Prosecutor General has also been supportive of such developments and ordered the creation of a specialized unit on

4 Constitution of the Peoples' Republic of Bulgaria, Art. 126, § 1.

5 The four levels of courts are described in the Judicial System Act, St. Gaz. No. 59/1994. Chapter IV, Art. 37-100 were introduced in 1994 with a view to amendment of the procedural, civil and criminal codes. The Supreme Court of Cassation and the Supreme Administrative Court were created in December 1996, and appellate courts were created in April 1998. In 1998 amendments to the Code of Criminal Procedure, St. Gaz. No. 21/1998, and the Code of Civil Procedure, St. Gaz. No. 127/1997, created three levels of judicial proceedings: trial, appeal on facts and law, and cassation appeal on issues of law only. Prior to these procedural amendments, which changed the grounds for appeal and the review powers of the courts on appeal, the new courts applied the old procedures. Under the current system, if a case starts in the district courts, the first appeal is before the county court and the second before the Supreme Court of Cassation. If the case starts in the county court, the first appeal is before the appellate court, and the second appeal is before the Supreme Court of Cassation. In administrative matters, final appeal is to the Supreme Administrative Court. Prosecutors are also parties to administrative cases.

6 The Supreme Administrative Court operates as court of cassation in the area of administrative jurisdiction carried out by ordinary courts, and exercises original jurisdiction assigned to it by the Supreme Administrative Court Act. An administrative court system is currently being created.

7 Constitution of the Peoples' Republic of Bulgaria, Art. 129 § 2. The President may refuse to appoint an individual nominated by the Supreme Judicial Council, but if the Council nominates the same person a second time, the President must appoint him.

8 There are also 28 county Investigation Services, matching the number of county courts and prosecution offices. For recent changes in the role of the Investigation Services, see below, Sec. 4.4.

9 Report on the Activities of the Prosecution Service of the Republic of Bulgaria, 1999 – February 2006, <<http://www.prb.bg/>>.

“Countering Organized Crime and Corruption” shortly after his appointment.<sup>10</sup>

The hierarchical structure of the Prosecution Service is mirrored in the powers of higher-ranking prosecutors in individual cases. There are no rules or procedures for assigning cases; the head of each respective prosecution office assigns cases<sup>11</sup>. A higher-ranking prosecutor in the chain of command has full power to intervene in any case, as well as the power to replace prosecutors on individual cases.<sup>12</sup> Such interventions usually only take place on appeal of a lower-level prosecutor’s decision, however. Only instructions in writing from a higher prosecutor to a subordinate prosecutor are mandatory, oral instructions being considered a violation of an individual prosecutor’s independence. Still, oral instructions are in fact given, although it is difficult to estimate how widespread this practice is.<sup>13</sup>

Hierarchical control is also exercised through the appeal process. Prosecutors’ decisions are subject to appeal to the next level; thus decisions of a prosecutor from a district office can be appealed before the county office, appellate office and the Supreme Cassation Prosecution Office, providing in each instance an indirect check or control on prosecutors’ decisions.

## 2.2. Budgeting process

The Judicial Authority has a constitutionally guaranteed independent budget,<sup>14</sup> which includes the budgets of the Prosecution Service, the courts and the Investigation Service. Each year, the Supreme Judicial Council files a budget proposal with Parliament along with a financial report for the previous year,<sup>15</sup> but Parliament routinely approves a parallel proposal drafted by the Ministry of Finance and submitted by the Council of Ministers, which in past years was often little more than half the budget proposed by the Supreme Judicial Council.<sup>16</sup> As a result, the Judicial Author-

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<sup>10</sup> See Administrative Order 905 of Mar. 23, 2006 of the Prosecutor General, <<http://www.prb.bg/>>.

<sup>11</sup> This approach has been criticized and draft legislation pending in Parliament provides for a system of computerized automatic assignment of cases, copying the approach taken by the courts.

<sup>12</sup> **Judicial System Act, Art. 116, St. Gaz. No. 59/1994, last amended by St. Gaz. No. 133/1998**, reads: “A higher ranking prosecutor may perform any action within the competency of his subordinate prosecutors, and repeal or suspend in writing their rulings where provided for by law. Instructions in writing of a higher prosecutor are mandatory for his subordinate prosecutors.” The trend towards specialization among prosecutors, noted above, may introduce new complications into the system of superior intervention.

<sup>13</sup> Surveys of judges and prosecutors suggest that such informal influence does take place. As they are considered a violation of prosecutorial independence, such cases tend to become known only when a prosecutor protects himself by publicizing the incident in the media.

<sup>14</sup> Constitution of the Peoples’ Republic of Bulgaria, Art. 117, § 3 (“[T]he judicial branch of government shall have an independent budget.”).

<sup>15</sup> Judicial System Act, Art. 196, St. Gaz. No. 59/1994.

<sup>16</sup> For example, for 2002 the Supreme Judicial Council proposed a budget of 208 million Lev (approx. EUR 104 million). The Minister of Finance initially made a budget proposal to the Cabinet of 106 million Lev (approx. EUR 53 million). After members of the Supreme Judicial Council lobbied the Prime Minister, he agreed to an increase of 15 million Lev, or a total of 122 million Lev (approx. EUR 62 million), which is the amount the Council of Ministers submitted to Parliament and which Parliament ultimately approved.

ity was significantly under-funded. However, as a result of EU criticism, funding for the justice system has increased significantly since 2002. Thus the budget of the entire justice system was 97 million Lev (2 Lev = 1 EUR) for 2001 and 122 million Lev for 2002. The justice system's budget has since grown rapidly, to a total budget of 313 million Lev for 2007. This represents an increase of roughly 275% over 5 years, with inflation for the same period roughly 25%.

The Prosecution Service did not have a separate budget until 2002; instead, Parliament adopted a joint budget for the courts, the prosecution, and the investigative agencies. In 2002, Parliament voted a separate budget for the prosecution, 30 million Lev out of the total budget of 122 million, and has continued to do so since.<sup>17</sup>

Parliament specifies funding levels for the Supreme Court of Cassation, the Supreme Administrative Court, the Prosecution Service, and the Investigation Service in the Annual Budget Act; the Supreme Judicial Council then allocates these funds within the guidelines Parliament has specified.<sup>18</sup> The Council's decision-making about allocation of resources is not public, but apparently there have been tensions over allocation within the Council.<sup>19</sup> There is no public review of the parliamentary budget process; indeed, publicly available financial reports do not itemize the expenses of different institutions, courts, investigative agencies, and so on, but instead provide a total figure for the entire justice system.<sup>20</sup> Control over spending of the Judicial Authority's budget is exercised by the Supreme Judicial Council and the Audit Chamber,<sup>21</sup> which reports on its findings to Parliament. The Audit Chamber has found irregularities with respect to the courts—though with little actual effect—but has never reported irregularities with respect to the Prosecution Service.

Approximately 20 percent of the overall budget of the Judicial Authority is normally reserved for the Prosecution Service, with 45-50 percent for the courts and 20 percent for the Investigative Services (the remainder includes investments, buildings, training institutes, and the like). The Prosecution Service's budget for 2007 was 84

<sup>17</sup> See *infra* note 22.

<sup>18</sup> Until 1998, Parliament voted separate budget guidelines for the Supreme Court, the lower courts, and the Prosecution and Investigation Services. Between 1999 and 2001, Parliament did not specify separate budget guidelines, leaving it to the Supreme Judicial Council to allocate funding to each institution. Beginning with the 2002 budget, Parliament again specified funding for separate institutions within the Judicial Authority. See, e.g., Annual Budget Act for the Year 2002, St. Gaz. No. 111/2001 [hereinafter "Annual Budget"].

Technically, the Supreme Judicial Council therefore would seem to have allocatory discretion only over the lower courts' budgets. In reality, however, the SJC also possesses a degree of discretion with regard to the higher courts. This stems, first of all, from its discretion over common expenses such as capital investments and equipment, and second of all, from its power to determine additional salary payments. The SJC determines the salaries of judges and prosecutors, which is decisive for each year's budget. It may also reconsider those decisions in light of the budget it receives from Parliament. Ministry of Finance reports suggest that every year, the SJC spends more than planned, and the government is apparently willing to cover this.

<sup>19</sup> Information from author's discussions with SJC members.

<sup>20</sup> Thus the report for 2004 states expenses of 249 million, while the total budget is 230 million. This suggests that the SJC has more discretion in allocating funds than indicated by the budget itself, and that a process of negotiation occurs both with the executive and within the SJC between the various institutions.

<sup>21</sup> The Audit Chamber is an independent institution that reports to Parliament and is empowered to audit every government institution.



million Lev (EUR 42 million), out of a total justice system budget of 313 million Lev.<sup>22</sup> About 70 percent of the Prosecution Service's budget—like that of the Judicial Authority as a whole—is spent on personnel costs: salaries, unemployment benefits, health insurance, and other compensation.<sup>23</sup> Thus decisions concerning the number of prosecutors and support personnel (which are made by the Supreme Judicial Council) largely determine funding priorities.<sup>24</sup>

### 2.3. The status of the prosecutor general

According to the Constitution, the Prosecutor General is nominated by the Supreme Judicial Council in a secret vote and appointed to a seven-year term by the President, who may not reject a second nomination by the Council.<sup>25</sup> Members of the Council may propose nominees to the Council, but five members must support the nomination.<sup>26</sup>

There have been three Prosecutor Generals under the current constitutional dispensation, and all choices appear to have been strongly influenced by political considerations.<sup>27</sup> There were several candidates for the second appointment, which was made in 1999. In none of the cases was there public debate, and no candidate made public commitments to particular policies. Transparency has not been a feature of this system, which allows political deals that do not necessarily reflect the public interest.

The third Prosecutor General was elected in January 2006. His election demonstrated once again that a great deal of deal-making occurred, while the public saw only a staged performance. Several months before the election, politicians of all stripes began discussing the process and supporting one or another potential candidate

22 The Service's budget has increased over the last few years: 2001: 30 million, 2002: 30 million, 2003: 27 million, 2004: 44 million, 2005: 51 million, 2006: 58 million, and 2007: 84 million. The 2007 increase is in part a result of the expanded functions of the prosecution service under the 2006 Criminal Procedure Code.

23 According to the financial director of the Supreme Judicial Council, although some budgets might suggest even higher personnel costs.

24 See Annual Budget, *supra* note 18. Increases in personnel have been justified by a substantial increase in the caseload since the mid-1990s, when there was a surge in the number of criminal charges filed with the courts:

year	cases heard
1996	14,000
1997	18,000
1998	23,000
1999	below 25,000
2001	above 30,000
2002	above 30,000

25 The President may refuse to appoint a nominee once, but if he is re-nominated his appointment is automatic. Judicial System Act, Art. 27 § 1(1), St. Gaz. No. 59/1994.

26 Judicial System Act, Art. 28, St. Gaz. No. 59/1994.

27 The appointment of the first two Prosecutor Generals was influenced by the Union of Democratic Forces, the major political opponent of the Socialist Party, which was able to influence the vote through the members of the Council elected by Parliament.

for Prosecutor General, while candidates began to position themselves. The President gave interviews describing the background and qualities a Prosecutor General should have, clearly indicating which of the potential candidates he would not support. Meetings took place within the ruling coalition.<sup>28</sup> The candidate was chosen Prosecutor General within a few days, after a hearing before the Supreme Judicial Council that lasted less than an hour and at which few questions were asked. Later, the President publicly admitted that appointing the ex-Prosecutor General ambassador to Kazakhstan, something for which he was strongly criticized, was an unavoidable compromise he and the government had to make to ensure the new Prosecutor General's election.<sup>29</sup>

Thus in reality, it may be said that all three Prosecutors General have in fact been selected by the government in power at the time and approved by the SJC. This is abetted by the fact that elections have so far involved a president and Parliament of the same party. Since the SJC is appointed by the respective majority in Parliament and the Government has other mechanisms of influencing members for the SJC, it is willing to go along.

The Prosecutor General heads the Prosecution Service and has very broad powers over its activities, in terms both of career development of individual prosecutors and of decision-making in individual cases.

The Prosecutor General reports to the Supreme Judicial Council, but the Council has little clear authority to hold the Prosecutor General accountable in any meaningful way. For example, the Supreme Judicial Council's response to a series of allegations of prosecutorial malfeasance have not been effective. In December 2002, after an investigation in the course of which a number of investigators and prosecutors were questioned, the Council attempted to censure the Prosecutor General, voting thirteen to nine in favor of a declaration of no confidence and calling on the Prosecutor General to resign.<sup>30</sup> The Prosecutor General ignored the entire proceedings before the Council: He did not attend the deliberations or comment in public on the Council's declaration, and in fact simply ignored it. In fact, until recently the Council had no authority to remove the Prosecutor General, and there was no disciplinary, criminal, or administrative procedure to investigate the Prosecutor General for alleged wrongdoing.<sup>31</sup>

28 The president apparently lobbied for his legal advisor, Boris Velchev, who in the end was elected.

29 For media commentary, see, for example, *Velchev is the Only Nominee for Prosecutor General. The Opposition Appalled by the Political Interference and the Obedience of the Supreme Judicial Council*, *Mediapool*, Jan. 18, 2006.

30 **The Council's vote followed a number of proceedings held by the Council examining allegations of** improper management and abuses of power by the Prosecutor General and his immediate subordinates. Allegations included withdrawing prosecutors and investigators from cases for refusing to follow oral instructions.

31 The amendments to the Judicial System Act of April 2004 allow five members of the Council to request that the Council strip the Prosecutor General of his immunity. However, the Constitutional Court declared a similar provision (allowing the Presidents of the two Supreme Courts and the Minister of Justice jointly to propose to the Council that a magistrate be stripped of his immunity and suspended) contrary to the constitutional provision that the prosecution service shall bring criminal charges. Judgment of the Constitutional Court of 14 January 1999. In light of this ruling, it is difficult

Even in those areas in which the Supreme Judicial Council could legitimately act to restrain the Prosecutor General, it has not done so. Only on a few occasions has the Council refused to defer to a proposal by the Prosecutor General for appointment of a prosecutor, for example.<sup>32</sup> In his power to nominate, the Prosecutor General can occasionally be stopped, but in general he gets what he wants.

## 2.4. The status of individual prosecutors

The basic constitutional and legal guarantees of prosecutors' personal independence are expressed in the mechanisms determining their professional career path and in their permanent tenure and immunity from prosecution (considered in the next section).

A prosecutor on a standard career path begins in a district prosecution office and moves up the hierarchy. Prosecutors are civil servants with standard promotion schedules based on seniority. As noted, prosecutors are appointed, promoted, demoted, re-assigned, and dismissed by the Supreme Judicial Council.<sup>33</sup> However, although there are certain formal criteria (such as Bulgarian citizenship, a clean criminal record, a university education in law, and completion of a legal traineeship<sup>34</sup>), initial appointment and later promotion have not been based on clear criteria or formal evaluation of performance, and to date there have been no national recruitment competitions. Recent amendments, however, have introduced an open competition for entry into the system and performance evaluation for later promotion.

Instead, heads of prosecution offices have until now selected candidates for their offices and submitted them to the Supreme Judicial Council,<sup>35</sup> which, lacking detailed information on candidates or independent means to evaluate them, generally follows the proposals. Likewise, the Prosecutor General selects candidates for all prosecutor positions within the Supreme Cassation Office and for heads of prosecution offices and submits them to the Council,<sup>36</sup> where they are generally approved. Members of the Council and the Minister of Justice also have the right to nominate prosecutors, but in practice do not do so.<sup>37</sup>

Higher positions with the county and appellate prosecution offices or as heads of offices require a certain length of professional legal experience.<sup>38</sup> After five years, a

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to see how the new procedure will function or how it could withstand constitutional scrutiny.

32 The Council has also been unable to carry out disciplinary proceedings against prosecutors without the approval of the Prosecutor General. In one such case, the Council opened disciplinary proceedings against prosecutor Nikolay Kolev, but Kolev refused to appear before the Council, and the Council was not empowered to take any measures to compel or discipline him.

33 Constitution of the Peoples' Republic of Bulgaria, Art. 129 (1); Judicial System Act, Art. 27(1), 4, St. Gaz. No. 59/1994.

34 The law also requires that the candidate has "necessary professional and moral integrity[.]" Judicial System Act, Art. 126, St. Gaz. No. 59/1994.

35 Judicial System Act, Art. 30 § 1 (3-7), St. Gaz. No. 59/1994.

36 Judicial System Act, Art. 30 § 1 (3-7), St. Gaz. No. 59/1994.

37 In May 2004, new heads were appointed for all appellate prosecution offices, all of whom were nominated by the Prosecutor General.

38 Judicial System Act, Art. 132 §§ 1-7, St. Gaz. No. 59/1994. Regional Prosecutor—5 years, appellate

prosecutor who receives a positive evaluation by the Supreme Judicial Council is granted life tenure. The Constitution initially provided for a three-year probationary period in office, after which the prosecutor would receive automatic life tenure and could be removed from office only “upon retirement, resignation, upon the enforcement of a prison sentence for a deliberate crime, or upon lasting actual disability to perform their functions over more than one year.”<sup>39</sup> Criticisms of magistrates being untouchable, as it were, and concerns about a lack of effective disciplinary responses to abuses of power, corruption, and poor professional performance, led to a constitutional amendment in 2003 lengthening the probationary period and making it subject to a positive evaluation of the magistrate’s performance by the Supreme Judicial Council.<sup>40</sup>

While in office, prosecutors are not allowed to hold any other public office, whether elected or appointed, in any state or municipal agency or company. Prosecutors are also prohibited from practicing law as advocates or providing legal advice outside their official capacity.<sup>41</sup> They are also barred from engaging in any commercial or other economic or profit-making activities; this includes membership of managing of supervisory boards of private companies or contractual services.<sup>42</sup>

However, a prosecutor may still pursue a political career, as magistrates may suspend their duties while taking elected or appointed government jobs and are guaranteed their positions as magistrates when they return;<sup>43</sup> time spent in public office, for which legal education is required, is also considered to be professional legal experience towards requirements for promotion.<sup>44</sup> Thus it is possible for magistrates to serve in elected or appointed offices without necessarily jeopardizing their professional careers. Nonetheless, prosecutors may not be members of political parties, organizations, movements, or coalitions with political aims while serving.<sup>45</sup> Consequently, although prosecutors as well as other magistrates can run for political office, in reality this does not take place.

A prosecutor may be transferred to a job in a different location, either as a temporary measure, called “commissioning,” or as a disciplinary measure, called “reassignment.” Reassignment may be imposed for up to three years, and takes place in accordance with disciplinary procedures. A head of office may order a prosecutor to accept a commission in another office for up to three months within a given year, as the need

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prosecutor–8 years, Supreme Court prosecutor–12 years.

39 Constitution of the Peoples’ Republic of Bulgaria, Art. 129(3), *repealed* St. Gaz. No. 79/2003 (2003).

40 The legislation bringing the Judicial System Act into conformity with the Constitution was adopted in April 2004.

41 Judicial System Act, Art. 132 § 1, St. Gaz. No. 59/1994.

42 Academic research and teaching are the only exceptions to the overall ban on outside activities. A prosecutor may be a member of an NGO, but only if the NGO does not participate in any “economic activities.” Publishing and selling books would be considered an economic activity. Judicial System Act, Art. 132 § 1(4), St. Gaz. No. 59/1994.

43 The Election of Members of Parliament Act, Art. 52, stipulates that those running for Parliament must suspend performance of their duties in public service and, if elected, may, after the expiry of their term, be reinstated in their previous position.

44 Judicial System Act, Art. 127 § 6, St. Gaz. No. 59/1994, *amended by* St. Gaz. No. 39/2006.

45 Judicial System Act, Art. 12, St. Gaz. No. 59/1994.

arises;<sup>46</sup> longer or more frequent commissions require the prosecutor's consent.<sup>47</sup>

While normal statutory retirement ages are 60 years of age for men and 55 ½ for women, a special mandatory retirement age for prosecutors of 65 years of age was introduced with amendments to the Judicial System Act in 2004.<sup>48</sup> Prosecutors may continue to work after retirement age at the discretion of the respective head of office.

Salaries and other benefits are determined by the Supreme Judicial Council.<sup>49</sup> Salary levels were relatively low in the mid 1990s, but have been gradually increased to levels that make prosecution jobs attractive and guarantee sufficient numbers of applicants.<sup>50</sup> For example, the entry-level salary of a regional prosecutor is set at twice the average salary of other civil servants.<sup>51</sup> The Prosecutor General's remuneration is set by law at 90 percent of the remuneration of the President of the Constitutional Court.<sup>52</sup>

## 2.5. Individual accountability of prosecutors

Prosecutors cannot be personally sued for damages resulting from actions performed in their official capacity, being civilly liable only for deliberate criminal acts.<sup>53</sup> Prosecutors are criminally liable for any actions outside their official capacity and for deliberate crimes in their official capacity; for crimes committed in their official capacity, no charges can be brought without the approval of the Supreme Judicial Council.<sup>54</sup> A prosecutor also may not be detained without the permission of the Supreme Judicial Council, unless arrested at the scene of the crime.<sup>55</sup> The Prosecutor General or five members of the Council may file a request to the Supreme Judicial Council to lift the immunity of a prosecutor.

However, these provisions governing immunity have only been in effect since April 2004, and so examples of prosecutors being held criminally liable have been very rare, as previously it was practically impossible to investigate and charge a prosecutor.<sup>56</sup>

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46 Judicial System Act, Art. 130, St. Gaz. No. 59/1994.

47 The Union of Bulgarian Jurists and several individual prosecutors have raised concerns that commissioning is used as a sort of disciplinary measure outside the normal procedures.

48 Judicial System Act, Art. 131 § 1, St. Gaz. No. 59/1994, amended by St. Gaz. No. 29/2004.

49 Judicial System Act, Art. 27 § 1 (5), St. Gaz. No. 59/1994.

50 In the 1990s, many magistrates were leaving the profession for better-paid private practice. Although there is no official data, the author's observations suggest that this trend reversed in the late 1990s. Competition for the job of prosecutor is now quite intense.

51 Judicial System Act, Art. 139 §§ 1-3.

52 That is, it is equal to the remuneration of a regular judge in the Constitutional Court. In the Constitutional Court Act, the remuneration of the president of this Court is determined in correlation with the remuneration of the President of the Republic and the Speaker of Parliament.

53 All magistrates "are exempt from civil and criminal liability for acts and omissions in the exercise of their judicial functions unless the act constitutes a deliberate criminal offense." Judicial System Act, Art. 134, amended by St. Gaz. No. 29/2004). Lawsuits can be brought against the Prosecution Service, but in practice such suits have been limited almost exclusively to claims for damages for unsuccessful prosecution.

54 Judicial System Act, Art. 134 § 2, amended by St. Gaz. No. 29/2004.

55 Judicial System Act, Art. 134 § 3, St. Gaz. No. 59/1994, last amended by St. Gaz. No. 86/2006.

56 Previously, prosecutors enjoyed the same immunity as members of Parliament: they had absolute

Disciplinary proceedings can be initiated by the relevant head of office, the Minister of Justice, or five members of the Supreme Judicial Council.<sup>57</sup> Disciplinary proceedings are held by a five-member disciplinary panel established by the Council from its own members chosen by lot.<sup>58</sup> Proposals for disciplinary measures are served upon the prosecutor concerned, who may present a written reply within two weeks; other written and oral evidence may also be collected and heard and the prosecutor may attend the hearing of the panel and be represented by a lawyer.<sup>59</sup> The disciplinary panel draws a conclusion and recommends disciplinary measures to the full Council.<sup>60</sup> The decision of the Council in disciplinary proceedings may be appealed to the Supreme Administrative Court.<sup>61</sup>

The original disciplinary system came under sharp criticism for, among other things, not allowing removal of magistrates under any conditions: all had life tenure and faced only mild disciplinary sanctions. Meanwhile, reports surfaced of prosecutorial misconduct, including possible links between prosecutors and organized crime,<sup>62</sup> along with sociological research indicating the existence of corruption within the judicial system in general and the Prosecution Service in particular.<sup>63</sup> In April 2004, the laws were amended to reflect the widely accepted need for a more effective disciplinary process for magistrates. These amendments followed 2003 Constitutional amendments allowing tenured magistrates (including the Prosecutor General and the presidents of the Supreme Courts) to be removed from office by the Supreme Judicial Council for “serious infringement or systematic neglect of their official duties, as well as actions undermining the prestige of the Judiciary.”<sup>64</sup> The Judicial System Act of April 2004 laid down a list of disciplinary sanctions, namely warning, reprimand, demotion either in rank or in office (for both prosecutors and judges, rank has an effect on salary, while office has an effect on the job they perform), and removal from office.

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immunity from criminal prosecution for minor offenses and could be investigated and prosecuted for serious offenses (a serious offense is defined as a crime punishable by imprisonment of **more** than five years, Criminal Procedure Code, Art. 93 § 7) only after the Supreme Judicial Council had lifted their immunity. These arrangements were the source of widespread criticism and were changed by Constitutional amendment in 2003.

57 Judicial System Act, Art. 172, St. Gaz. No. 59/1994.

58 Judicial System Act, Art. 33, St. Gaz. No. 59/1994.

59 Judicial System Act, Art. 178, St. Gaz. No. 59/1994.

60 Judicial System Act, Art. 181, St. Gaz. No. 59/1994.

61 Judicial System Act, Art. 184, St. Gaz. No. 59/1994.

62 In a presentation at a conference in Sofia on May 23, 2004 on the fight against corruption, for example, the Prosecutor General expressed concerns about the influence of organized crime on individual prosecutors.

63 According to the Corruption Assessment Report 2000 prepared by Coalition 2000. The European Commission Regular Report 2000 pointed out that “according to several surveys . . . customs, the police and the judicial branch are considered to be the most corrupt professions in Bulgaria.”

64 Constitution of the Peoples’ Republic of Bulgaria, Art. 129 § 3, *amended by* St. Gaz. No. 85/2003.. The full list of grounds for the removal of a magistrate according to the amendments is:

1. having reached 65 years of age;
2. resignation;
3. entry into force of a final sentence imposing imprisonment for an intentional criminal offense;
4. permanent de facto inability to perform their duties for more than a year;
5. serious infringement or systematic neglect of their official duties, as well as actions undermining the prestige of the Judiciary.



These developments removed the procedural barriers to individual accountability of prosecutors. However, the lack of an effective disciplinary process resulted not only from procedural deficiencies, but from a lack of accountability in the system as a whole. No matter what evidence of abuse of power arises, no matter what the public feels, the system does not come under any pressure, as it is completely isolated from the voters. Thus corporate loyalty remains most important, and there is no will within the Supreme Judicial Council to investigate and enforce discipline, as two steps taken by the SJC following the amendments of April 2004 clearly show. In early 2005, it voted to deny the three-member disciplinary committee the right to investigate wrongdoing on the part of magistrates when there is evidence of a crime, reasoning that, under the Constitution, only the Prosecution Service has such powers. It also decided to keep confidential any information about disciplinary sanctions until a final decision of the appeals court.

Two cases underscore the climate of corporate loyalty and disregard for the public interest that are the primary reason for lack of accountability. In one case, in the fall of 2004, an investigator was arrested by the police for allegedly receiving cash from a suspect in return for closing the investigation. The arrest was organized by the police, who were apparently tipped off by subordinates of the investigator. The two subordinates publicly accused their boss and high ranking investigators and prosecutors of corruption. The SJC took up the case, but then came to the above-mentioned conclusion that it could not investigate. Still, the investigator's immunity from prosecution was lifted, and he was charged. The criminal case went nowhere. No investigation was ever initiated into the allegations of widespread corruption. Instead, the two subordinates were heavily pressured by the prosecution service and the investigative service, forcing one of them to resign.

In January 2006, apparently on the instructions of the then-acting Prosecutor General, the five prosecutor members of the SJC submitted a report to the Council alleging that the President of the Supreme Court had intervened in individual cases and pressured judges to decide in favor of his friends and business contacts. He was also alleged to have received perks from private companies. The prosecutors presented a file of wiretaps, allegedly of the President of the Supreme Court discussing cases and promising assistance. On the same day, the President of the Supreme Court presented to the media a medical document, which turned out to be forged, claiming that the Prosecutor General suffered from paranoia. The five prosecutors on the SJC declared that by publishing a forged document, the President of the Supreme Court had committed a crime. The SJC scheduled a separate hearing on the matter for the day after the Prosecutor General's term in office expired. The hearing was held behind closed doors, and all the information the public received was that the SJC (including the five prosecutors) had unanimously decided that there was no evidence of a crime and accepted the apology of the president of the Supreme Court for his mistake in releasing a forged document to the public.

## 2.6. Training

Efforts have recently been made to establish both initial training programs for newly recruited prosecutors and continuing training through a training center for all magistrates, and they have produced some positive results. With the help of foreign donors, a National Institute of Justice was created in 2002 as a government institution, established by the Judicial System Act as part of the SJC.<sup>65</sup> The law provides for mandatory six month training of all newly appointed judges and prosecutors.<sup>66</sup> Participants in that training and outside observers have assessed this training very positively.

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## III. Functions and Powers of Prosecutors

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### 3.1. Prosecutorial functions in criminal justice

The Prosecution Service plays a key role in all stages of criminal proceedings: opening and controlling an investigation; deciding to indict or drop charges; presenting charges at trial; conducting appeals. The prosecutor is the leading authority in an investigation, with both the police and the Investigation Service obliged to follow prosecutorial instruction, while prosecutors are able to conduct investigations on their own.<sup>67</sup> Although investigators may offer their own opinion as to whether or not a suspect should be indicted, this opinion has only advisory character; the prosecutor retains full authority to decide whether or not to proceed.<sup>68</sup>

*Mandatory Prosecution and Discretion:* Prosecutors have an effective monopoly over bringing charges in court. For a very limited number of crimes, the victim also has standing to bring charges to court.<sup>69</sup> The overall number of such prosecutions is negligible, however, and even in these cases, the prosecutor may join the proceedings.<sup>70</sup>

This does not mean that prosecutors have unfettered formal discretion, however. On the contrary, the criminal justice system is governed by the principle of mandatory prosecution: prosecutors may refuse to prosecute only if the alleged act is not a crime, the statute of limitations has run, the potential defendant could not be otherwise held

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<sup>65</sup> Judicial System Act, Art.35e, St. Gaz. No. 59/1994.

<sup>66</sup> Judicial System Act, Art. 35, St. Gaz. No. 59/1994.

<sup>67</sup> Criminal Procedure Code, Art. 46 § 23 and Art. 196 § 1, St. Gaz. No. 86/2005, expressly states that investigating authorities, i.e. police investigators and the Investigation Service, are placed under the authority of the relevant prosecutor.

<sup>68</sup> Criminal Procedure Code, Art. 242 § 1, St. Gaz. No. 86/2005.

<sup>69</sup> These are minor bodily injuries, certain injuries between close relatives, and criminal libel. Criminal Procedure Code, Art. 161 § 1, St. Gaz. No. 26/1968, last amended by St. Gaz. No. 86/2005.

<sup>70</sup> Criminal Procedure Code, Art. 45, St. Gaz. No. 89/1974, last amended by St. Gaz. No. 102/2006.



criminally liable, or there is insufficient evidence to prove the charges.<sup>71</sup> Prosecutors do have limited discretion in deciding whether or not to prosecute if an act that otherwise constitutes a criminal offense is of “minor importance” and presents a “minor threat to public order.”<sup>72</sup> There are no guidelines on how this provision should be interpreted, and its interpretation in practice is not monitored.

The rule of mandatory prosecution and the hierarchical structure of the Prosecution Service, with the possibility of appealing any decision of a lower-level prosecutor, are supposed to guarantee equality in law enforcement. In practice, however, there is almost no research on policies and decision-making regarding the exercise of prosecutorial discretion within the Prosecution Service. This is in part due to the Bulgarian legal academy’s traditional focus on legal theory rather than sociological research, but it is also in part due to a lack of interest and support within the Service itself for more thorough research. Some tentative conclusions, however, are possible.

The structure of the criminal justice system, involving three separate, autonomous agencies, and the rule of mandatory prosecution have resulted in a system that establishes priorities and copes with excessive workloads by delaying investigations.

This is not necessarily or solely a prosecutorial decision, as most investigation is carried out by the police or Investigation Service, and prosecutors have no way of forcing investigators to produce evidence. However, prosecutors can also delay a case by sending it back for additional investigation; such delays can eventually lead to dropping the case, as evidence loses its reliability or statutory limitations take effect. There has been no research on such delays, and there is no reliable data on the overall numbers of cases;<sup>73</sup> there is a general understanding, however, that this

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71 Criminal Procedure Code, Art. 23, St. Gaz. No. 86/2005. In a recent case at the European Court of Human Rights, *M.C. v Bulgaria*, judgment of December 4, 2003, the Court had to review a refusal of the prosecution service to indict two men on charges of rape. The prosecution service ruled in that case that there was insufficient evidence to press charges, as there was no evidence that the victim, a few months short of 15 years of age, had physically resisted. The Court found a violation of the Convention, reasoning that such an evidentiary standard does not provide proper protection to victims of rape.

72 Criminal Procedure Code, Art. 9 §2, St. Gaz. No. 26/1968, last amended by St. Gaz. No. 88/2005. Under the law, “An act is not a crime, even if it formally meets the description of a crime,” if it is insignificant and a minor threat to public safety and order. Because of the principle of mandatory prosecution, legal theory would deny that this is a discretionary power, arguing that the act is not a crime. In fact, it is a discretionary power not to prosecute that prosecutors do not use often. A refusal to prosecute would usually be justified by lack of evidence that a crime was committed, without specifying legal grounds. There is no available statistical data on how often or on what grounds the prosecution drops cases. No publicly accessible data even exists on the number of decisions not to prosecute. The data that the Prosecution Service does publish lists the overall number of pretrial proceedings decided. These are most likely dropped cases, but it does not clearly say so, let alone on what grounds they were dropped. The overall figure for such pretrial proceedings that were decided was, for example, 175,627 for 2005 and 186,892 for 2004. The Prosecution Service provides these figures to prove how much work it does, but does not indicate what it means by “deciding pretrial proceedings” (other figures suggest that cases in which they decide to prosecute are not included), or the grounds on which cases were dropped. Data from *Report on the Activities of the Prosecution Service of the Republic of Bulgaria, 1999 – February 2006*, <<http://www.prb.bg/>>.

73 The police, the Investigation Service and the Prosecution Service each only publish data on the numbers of cases decided in their respective institutions over limited periods of time. The number of cases sent back from one institution to another is not well covered, and even when covered, the

is a significant problem. The Prosecution Service does not provide statistics on the number of pending investigations, but legal practitioners often report investigations pending over many years.<sup>74</sup> It is not unusual for a trivial or commonplace offense, such as a minor theft, to be brought to trial seven or eight years after the fact. Efforts to resolve this have been limited to introducing mandatory deadlines for finishing investigations (see below);<sup>75</sup> however, this will not address the underlying problems of workload and prioritization.

*Control and Accountability:* As the Prosecution Service's institutional organization does not allow external, political control over its operations, Parliament has sought to increase the Service's procedural accountability by introducing procedural safeguards with respect to both suspects and victims, allowing for appeals of a decision not to prosecute.<sup>76</sup> Increased accountability of the Service was first sought through the introduction of judicial review of the decision to terminate criminal proceedings.<sup>77</sup> Judicial review of these decisions was introduced for the first time in 1999, but the procedure has been amended several times since then: at first, review was automatic and *in camera*; this was changed to appeal by interested parties to all three levels of courts, up to the Court of Cassation; and the most recent amendments made these decisions subject to one level of appeal by a judge sitting *in camera*.<sup>78</sup> However, there are no studies of decisions not to prosecute or of how successful judicial review of these decisions has been.

To protect the rights of suspects in cases subject to substantial delay, who might be tied up in legal limbo for years, neither prosecuted nor cleared of charges, Parliament in 2003 adopted a procedure allowing a criminal defendant to petition the court, if the prosecutor has not filed charges after two years, to require him to file an indictment within two months; if the prosecutor fails to file an indictment by that deadline, the court may terminate proceedings in an *in camera* hearing.<sup>79</sup>

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data from these institutions are not comparable.

74 One example is the case of a defendant charged with theft from a car that allegedly took place in 1993. The investigation had been pending since then, until eventually charges were dropped in 2005 because there was no evidence of a crime. Practicing lawyers share similar experiences. The problem of investigations being "forgotten" in someone's desk drawer for years was admitted in 2000 when, according to information provided by the police, the Investigation Services transferred 30,000 pending investigations to the police.

75 Criminal Procedure Code, Art. 222, St. Gaz. No. 79/1974, last amended by 86/2005.

76 Criminal Procedure Code, Art. 237 §§ 3,4, St. Gaz. No. 79/1974, last amended by 86/2005.

77 The grounds for terminating criminal proceedings are related to the evidence and the criminal liability of the suspect. Criminal Procedure Code, Art. 21. Grounds for termination of proceedings include "when no crime was committed," statutes of limitations, amnesty, and the criminal defendant's unfitness to stand trial. There is no available statistical data on the grounds on which criminal proceedings were terminated.

78 Criminal Procedure Code, Art. 237, St. Gaz. No. 79/1974, last amended by St. Gaz. No. 86/2005.

79 Criminal Procedure Code, Art. 239(a) §§ 1-7, last amended by St. Gaz. No. 50/2003).

### 3.2. Relationship with the judge at the pre-trial stage

One of the central controversies related to the powers of the Prosecution Service has been the issue of pre-trial detention. In 1999, following judgments of the European Court of Human Rights in which the Court held that pre-trial detention ordered by a prosecutor violated the Convention,<sup>80</sup> Parliament adopted legislative amendments shifting this power from prosecutors to judges. Since 1999, a prosecutor may order the detention of a suspect for up to 72 hours and must file a request for pre-trial detention with the competent court. An appeal from the court's decision granting or refusing bail is available to both the prosecutor and the defendant.<sup>81</sup> The procedure has since been the subject of several legislative amendments<sup>82</sup> and is the subject of heated public debates.

The Prosecution Service has been lobbying to have its power to order pre-trial detention restored,<sup>83</sup> arguing that the procedure introduced in 1999 allowed many criminals with pending investigations "to walk free." The police have also complained that courts have been too lenient towards suspects in deciding on pre-trial detention. However, no statistical evidence has been offered to support these complaints.

Likewise, since 1999 wiretaps and searches and seizures have been subject to prior judicial approval, except for emergency cases.<sup>84</sup> Prior to the 1999 amendments, prosecutors were empowered to issue search, seizure, and electronic surveillance warrants of their own accord. The Prosecution Service has been particularly critical of the current procedure on wiretap warrants, as the police may request such warrants directly from the courts, without informing the relevant prosecution office.<sup>85</sup> According to the Prosecution Service, this also renders much of the evidence collected through wiretaps inadmissible due to police failure to follow proper procedures. As with other issues involving cross-institutional cooperation, however, diverging institutional interests and lack of trust make it difficult to overcome such lack of proper coordination.

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80 *Asenov and Others v. Bulgaria*, judgment of Oct. 28, 1998; *Nikolova v. Bulgaria*, judgment of Mar. 25, 1999.

81 **Criminal Procedure Code, Art. 152(a) § 11 Criminal Procedure Code, St. Gaz. No. 79/1974, last amended by St. Gaz. No. 86/2005).** The procedure has been amended several times, allowing for appeals to the Supreme Court of Cassation but later reducing it to only one level of appeal.

82 The Procedure has been amended four times: twice in 1997, in 1999 and in 2003. *See Criminal Procedure Code, St. Gaz. No. 79/1974, last amended by St. Gaz. No. 86/2005, previously amended by St. Gaz. Nos. 64/1997, 95/1997, 70/1999, and 50/2003.*

83 **The Prosecution Service rallied significant cross-party support for amendments to the Criminal Procedure Code, which were approved in the last session of the outgoing Parliament in 2001. Still, the suggested amendment to shift the power of pre-trial detention back to prosecutors, which would have violated the European Convention on Human Rights, did not pass.**

84 **Criminal Procedure Code, Art. 111a, St. Gaz. No. 79/1974, last amended by St. Gaz. No. 86/2005; Surveillance Act, Art. 18, St. Gaz. No. 95/1997, last amended by 86/2005.**

85 **Surveillance Act, Art. 13, St. Gaz. No. 95/1997, last amended by 86/2005.**

### 3.3. Powers outside the criminal justice system

The powers of the Prosecution Service extend to administrative and civil proceedings as well as criminal cases. This is a legacy of the system under the communist regime, in which the Prosecution Service was considered a tool of law enforcement in all fields of law. Prosecutors take part in judicial review proceedings of administrative acts along with the government agency affected, and may adopt an independent position on the dispute.<sup>86</sup> Prosecutors also take part in some civil proceedings in which a government agency is sued for damages.<sup>87</sup> Until the late 1990s, the Service also had the power to challenge privatization deals.<sup>88</sup>

Prosecutors also initiate proceedings for committing individuals to hospital for mandatory treatment and participate in proceedings for placing individuals under guardianship.<sup>89</sup>

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## IV. Relationship of the Prosecution Service to Other Organs of the State

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### 4.1. The constitutional location of the prosecution service

The Republic of Bulgaria is a parliamentary republic<sup>90</sup> that became a member of the European Union on January 1, 2007. Parliament consists of a single chamber whose members are elected to four-year terms. Parliament elects the Prime Minister and the other members of the Council of Ministers nominated by the Prime Minister. The President is head of state and is popularly elected, but has limited powers.<sup>91</sup>

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86 This power derives from the fact that the prosecution service is completely independent of the government, and under procedural laws they have standing in the procedure on their own, not as representatives of government. It is quite common for the prosecution to argue that certain acts of government are unlawful, contrary to the government's position.

87 State Liability for Damages Act, Art. 10 § 1, St. Gaz. No. 60/1988, *last amended by* 105/2005.

88 This power was taken away from the prosecution in order to ensure more efficient privatization procedures and because of concerns about abuse. This withdrawal of powers was criticized by some politicians and observers. One case demonstrating the risk of abuse was the subject of a recent judgment at the European Court of Human Rights, *Zlinsat, spol. s r.o.v. Bulgaria*, judgment of June 15, 2006, where the Court held that such interference by the prosecutor violated the right to a fair trial.

89 Health Act, Art. 157, St. Gaz. No. 70/2004; Civ. P. CODE, Art. 275 § 1, St. Gaz. No. 12/1952.

90 The present state system dates from the adoption of a new Constitution by a special parliamentary Constituent Assembly specifically convened for that purpose in 1991, shortly after the collapse of the communist regime at the end of 1989.

91 The President is also Commander-in-Chief and has the power to appoint a caretaker government if Parliament fails to elect a government, limited veto powers over parliamentary legislation, and the power to appoint heads of certain government services. With respect to the judicial system, the President appoints the presidents of the highest courts and the Prosecutor General.

The Constitution provides for a Judicial Authority (*sadebna vlast*) consisting of the courts, the Prosecution Service (*prokuratura*), and the Investigation Service (*sledstveni organi*).<sup>92</sup> The prosecution and investigation services are thus equal parts of the judicial system, along with the courts; judges, prosecutors, and investigators are all considered members of the judiciary, referred to as magistrates, with the same constitutional and statutory guarantees of independence both in their individual status and in the autonomous management of the courts, prosecution and investigation service respectively.<sup>93</sup> The Constitution vests overall management authority with respect to these three institutions in a single management body, the Supreme Judicial Council, which oversees the career development of magistrates and the management of all three institutions' finances.<sup>94</sup>

These arrangements were influenced by the desire of the Constitution's drafters, in the wake of the abuses of the Communist regime, to guarantee the independent, unbiased and fair administration of justice; concerns about possible abuses of power in opening investigations, bringing charges, and prosecuting, for example, led to the Constitutional provision granting the prosecution equal tenure and equal independence with judges.

Concerns about the politically motivated administration of justice were not abstract, but quite real and immediate. Elections for a special parliamentary Constituent Assembly in the fall of 1990 produced a majority for the ex-communist Bulgarian Socialist Party, which was nonetheless expected to lose the scheduled regular parliamentary elections. Those elections were to be held a year later, in the fall of 1991, following the dismissal of the Constituent Assembly after the adoption of the Constitution. The Constituent Assembly adopted legislation establishing the procedure for the election of the Supreme Judicial Council shortly after the adoption of the Constitution,<sup>95</sup> and immediately elected the first Supreme Judicial Council. This should have ruled out significant replacements of magistrates, keeping in place magistrates believed to be loyal to the Socialist Party. Shortly after the October 1991 parliamentary elections, however, the new majority in Parliament, led by the Union of Democratic Forces, amended the Supreme Judicial Council Act;<sup>96</sup> this was then used as a pretext for holding new elections to the Supreme Judicial Council, replacing the members elected by the previous, Socialist-dominated Parliament. This was done despite the Constitutional provision that Council members serve a five-year term. The new Council in turn appointed a Prosecutor General and a President of the Supreme Court loyal to the Union of the Democratic Forces. The Constitutional Court upheld the validity of the legislation, thus allowing significant replacements of judges and

92 Constitution of the Peoples' Republic of Bulgaria , Arts. 117-130, ch. 6.

93 "The judicial branch shall be independent. In the performance of their functions, all judges, prosecutors and investigators shall be subservient only to the law." Constitution of the Peoples' Republic of Bulgaria, Art. 117§ 2.

94 Constitution of the Peoples' Republic of Bulgaria , Art. 129. For detailed information on the Supreme Judicial Council, see below, Sec. 4.5.

95 Judicial System Act, St. Gaz. No. 59/1994.

96 **The Amendments to the Supreme Judicial Council Act, St. Gaz. No. 106/1991, allowed private attorneys to be members of the Supreme Judicial Council.** This amendment was used as grounds for dismissing the existing Supreme Judicial Council and electing a new one.

prosecutors.<sup>97</sup> Fears of politically motivated prosecution were later proved justified, with the newly established autonomous Prosecution and Investigation Services not acting as a check, but actually carrying out such prosecutions.<sup>98</sup>

Subsequent governments repeated the pattern, amending the legislative requirements for the composition of the Supreme Judicial Council and using this as grounds to terminate the Council elected by the previous Parliament and to elect a new one. The government attempted to do this again in July 1994, through legislative amendments<sup>99</sup> and calls for the election of a new Supreme Judicial Council. This time, however, the Constitutional Court declared the premature termination of the SJC's term in office unconstitutional.<sup>100</sup> The next Parliament, elected in 1997, also introduced new rules on the composition of the SJC and called for the election of a new SJC. Now the Constitutional Court refused to declare the termination of the SJC unconstitutional.<sup>101</sup> Since then, there have been no attempts to change the membership of the SJC prematurely.

## 4.2. Relationship with the legislature

Parliament has few direct formal powers over the Prosecution Service, and therefore has little control over the functioning of the Prosecution Service (or the Investigation Service). The only direct power it does have is authority to determine the budget of the Prosecution Service,<sup>102</sup> which Parliament passes as part of the overall budget of the Judicial Authority. In 2004, legislation was adopted requiring the Prosecution Service to submit a report to Parliament, but this remained a formality, as Parliament did not review or vote on this report. The Prosecution does not submit its report directly to Parliament, but to the Supreme Judicial Council, which submits it to Parliament along with reports from the courts and the Investigation Services.<sup>103</sup> This legal obligation was included in the amendments to the Constitution of February 6, 2007,<sup>104</sup> and the new constitutional provision states that Parliament must vote to approve the reports. It is not yet clear what consequences a refusal to approve would have, but as Parliament has no direct powers over the Prosecution Service and cannot conduct independent investigations of the Service's activities or of individual

97 Judgment No. 3 of Apr. 3, 1992, case No. 30/91 of the Constitutional Court, St. Gaz. No. 30/1992.

98 The most visible example of such politically motivated prosecution was the criminal proceeding against Andrey Lukanov, member of the Bulgarian Socialist Party and Prime Minister between 1990 and 1991. In 1992 Lukanov was charged with embezzlement for having voted for state aid for developing countries as a member of the Communist government. He was stripped of his parliamentary immunity upon the request of the Prosecutor General and later detained for more than one hundred days. Following his complaint of unlawful detention, the European Court of Human Rights ruled that there was no probable cause to justify Lukanov's arrest and found a violation of Article 5. See European Court of Human Rights, *Lukanov v. Bulgaria*, judgment of Mar. 20, 1997.

99 St. Gaz. No. 59/1994.

100 Judgment of the Constitutional Court No. 8 of Sept. 27, 1994, St. Gaz. No. 78/1994.

101 Judgment of the Constitutional Court No. 1 of Jan. 14, 1999, St. Gaz. No. 6/1999.

102 See Section 2.2 above.

103 Judicial System Act, Art. 27 § 1(10), St. Gaz. No. 59/1994.

104 Act on the Amendment of the Constitution of the Republic of Bulgaria, §§ 5, 6, St. Gaz. No. 12/2007.



prosecutors, nor request information on individual cases, even if Parliament refuses to approve its reports, this is not likely to have any significance.

However, Parliament has demonstrated a clear tendency to make assertive use of its legislative powers to influence the conduct of law enforcement, because of public pressure on the legislature and the executive for better results in the fight against crime and because the executive has no formal powers over investigation and prosecution (see below). Since 1990, Parliament has made numerous amendments to the two major pieces of legislation regulating criminal law in an effort to redefine the powers of the Prosecution and Investigation Services and introduce more efficient procedural accountability, passing 41 legislative acts amending the Criminal Code and 28 legislative acts amending the Criminal Procedure Code.<sup>105</sup> A new Criminal Procedure Code was adopted in 2005, effective as of April 2006.<sup>106</sup> The procedure for appealing a prosecutorial decision to terminate criminal proceedings has been amended three times since 1999 and 2002. (See Section 3.1 above.) However, these numerous amendments have not always produced the desired effects, and more often than not have been a sign of frustration on the part of Parliament and the government that they lack control over investigation and prosecution. Efforts aimed at making the investigative stage more effective, such as the introduction of strict deadlines, have had no positive effect.

### 4.3. Relationship with the executive

The executive has few direct powers with respect to the Prosecution Service. He has no power to issue general instructions as to priorities and policies, or to instruct in individual cases. As the executive is supported by Parliament,<sup>107</sup> however, the powers of Parliament (namely adopting the budget and amending legislation in the field of criminal law and procedure) are in effect exercised by the executive. For example, proposals to amend the Criminal Code and Criminal Procedure Code are as a rule initiated by the Council of Ministers.

The Judicial Authority is supposed to have budgetary independence,<sup>108</sup> and the Constitutional Court had held that the executive should submit to Parliament the budget proposal approved by the Supreme Judicial Council.<sup>109</sup> In practice, however, the Judicial Authority's budget is decided by the executive. The Council of Ministers, which is allowed to make its own proposals and objections,<sup>110</sup> has regularly submitted

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<sup>105</sup> Criminal Procedure Code, St. Gaz. No. 89/1974, last amended by St. Gaz. No. 86/2005.

<sup>106</sup> Criminal Procedure Code, St. Gaz. No. 86/2005.

<sup>107</sup> Because the leaders of the political parties with a majority in Parliament normally become members of the Council of Ministers, decision-making normally takes place to a large extent within the executive, with the majority in Parliament following the decisions of the Council of Ministers.

<sup>108</sup> Constitution of the Peoples' Republic of Bulgaria, Art. 117 § 3, St. Gaz. No. 56/1991 ("the judicial branch of government shall have an independent budget").

<sup>109</sup> Constitutional Court Judgment of Dec. 16, 1993, St. Gaz. No. 1/1994.

<sup>110</sup> Formation of the State Budget Act, Art. 15,16,19, St. Gaz. No. 67/1996.

a separate, parallel draft budget prepared by the Ministry of Finance.<sup>111</sup> Parliament has always, without hesitation or discussion, approved the budget submitted by the Council of Ministers. While this gives the government some control over the judiciary, it has little control over actual budget management, and budgeting is not linked to any targets or plans of action.

The Minister of Justice has some limited powers with respect to the decision-making process at the Supreme Judicial Council. The Minister calls and chairs sessions of the Council. However, he has no voting rights on the decisions and may only influence the agenda of the sessions.<sup>112</sup> Sessions of the Council may also be called upon the request of at least one-fifth of its members, and the Council must meet at least once every three months.<sup>113</sup> Sessions of the Council may be held without the Minister, if he is unable or unwilling to attend, with the presidents of the two Supreme Courts and the Prosecutor General taking turns serving as chairman. In addition, the Minister of Justice has recently been given the authority to recommend prosecutors for promotion,<sup>114</sup> while the Ministry also includes a department that may review the work of magistrates (except for magistrates at the highest levels) as well as organize the evaluation of magistrates' work.<sup>115</sup>

In fact, however, the influence of the Minister of Justice over the management of the Judicial Authority, and the Prosecution Service in particular, is limited. In fact, all decisions as to appointment, promotion, and demotion of prosecutors are made by the Prosecutor General, or the respective head of a prosecution office. Only rarely have judges and investigators on the Supreme Judicial Council blocked the Prosecutor General's proposals; even in those cases, the Minister of Justice played no role.<sup>116</sup> The extension of the Minister's powers has not substantially changed this. Throughout 2005 and 2006, institutional pressure on individual prosecutors in practice prevented the Minister from using these powers, and all appointment and promotion recommendations were made by prosecutors in the Prosecution Service.<sup>117</sup> The Supreme Judicial Council was able to block several appointments and promotions by the newly elected Prosecutor General in 2006. To achieve his aims, he was forced to use his authority to temporarily commission prosecutors to fill positions.

111 Formation of the State Budget Act, Art. 19, St. Gaz. No. 67/1996.

112 Constitution of the Peoples' Republic of Bulgaria, Art. 130 §5, St. Gaz. No. 56/1991.

113 Supreme Judicial Council Act, Art. 26, St. Gaz. No. 74/1991,

114 Judicial System Act, art. 30 §4, amended by St. Gaz. No. 29/2004. These powers relate to all three categories of magistrates.

115 Judicial System Act, art. 35b, amended by St. Gaz. No. 61/2003.

116 During a particularly bitter standoff from 2001 to 2003 between the judges and prosecutors on the Supreme Judicial Council, the judges and investigators voted on occasion to block proposals to appoint prosecutors nominated by the Prosecutor General, because of a perception that nominations were driven by personal loyalties rather than by professional standards.

117 Indeed, prosecutors gained even more power in the process. As judges are more independent of the judicial hierarchy, they were nominated by the Minister or other members of the Council. For each vacant judicial position, there was more than one candidate, and votes in the Council were divided. This gave greater power to the prosecutors on the Council to promote one or another judge. At the same time, judges on the Council, despite being more numerous, did not have much influence in the promotion of prosecutors, as for every vacancy there was always only one candidate.



The executive's lack of authority to give policy instruction has been a source of constant tension between the executive and the Prosecution and Investigation Services. Successive governments have complained that they are prevented from influencing policy and setting priorities in the fight against crime, while the Prosecution Service complains of a lack of cooperation by those investigative authorities, such as the police, that are within the executive (see below, Sec. 4.4).

In those limited areas in which the Prosecution Service has relationships with other government authorities, there has been no lack of cooperation (with the notable exception of the budgetary process, see above). The Prosecution Service receives security protection from a special government service within the Ministry of Justice that also provides security for other government agencies.<sup>118</sup> Prosecutors have the power to carry out investigations, though they rarely utilize it,<sup>119</sup> and to order government agencies to submit information in the course of such investigations; prosecutors do generally receive information and assistance in such cases.<sup>120</sup>

In practice, the relationship between the Prosecution Service and the political branches is marred by the Service's problematic political role, a result of its extreme independence. As the system has evolved, the Prosecution Service has become a political factor in its own right, building cooperation with or confronting politicians, including members of Parliament and the executive. The fact that the Prosecution Service is so independent of other branches of government and that there are no checks on it has made politicians vulnerable. They do not dare confront the Prosecution Service publicly, as such criticism has little effect on the Service; meanwhile, against a background of widespread corruption, as well as a public perception that politicians are corrupt, a criminal investigation against a politician—announced publicly by the Prosecution Service—can be very damaging to a political career, and the Prosecution Service has abused its power in this way.<sup>121</sup>

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118 The Ministry of Justice is in charge of the security of the court buildings, where prosecution offices are located.

119 It is very rare for a prosecutor to directly question a witness or suspect or engage in any other fact gathering. This is mainly due to the Service's organizational and institutional culture. Prosecutors simply do not have the time to investigate. Also, they have always been desk prosecutors, working only with documents. There is no tradition of investigation, and the service tends toward a bureaucratic mentality. Lack of initiative and closer control over investigations has been one of the principal criticisms by European Union experts; overcoming this passive approach on the part of the Prosecution Service was a goal of the latest amendments to the Criminal Procedure Code of September 2005, which placed the prosecution in charge of all investigations and required that every investigation be immediately reported to the Prosecution Service.

120 There has been a dispute as to whether the Prosecution Service should have access to tax information in the absence of a pending investigation. The Service has argued that it should, but the law requires an investigation and specific request related to the investigation as a precondition for tax authorities to provide such information. The issue appears, however, not to be one of lack of cooperation, but rather of drawing the proper line between law enforcement needs and privacy rights.

121 As one of many pieces of evidence of this abuse, the head of the Sofia City Prosecution Office said in an interview with the *Daily Trud* newspaper in January 2006 that in 2005 he was asked several times by the Prosecutor General's office to initiate criminal investigations against politicians in order to intimidate them. He refused to do so, and was later asked to leave his position as head of the office.

Holding up investigations against politicians has also been a tool used by the Prosecution Service. Under several consecutive governments, the Prosecution Service refrained from investigating members of the cabinet or the majority in exchange for preservation of the institutional powers of the Prosecution Service. At the same time, it investigated and charged opposition figures for privatization deals or other decisions made while they were in power. In some cases, even members of the party in power were investigated and charged when they pursued policies perceived by the Prosecution Service to be targeted against them. This pattern well illustrates the dangers of an overly independent, unchecked prosecution service.<sup>122</sup>

#### 4.4. Relationship with the police

As the police are a centralized institution within the Ministry of the Interior, and thus part of the executive, the police and the Prosecution Service have completely separate administrations. The police and the Service are institutionally and financially independent of each other; the Service has no authority over the appointment, training and professional development of police officers. With the exception of certain police investigative functions over which prosecutors exercise some supervision, police and prosecutors operate independently.

One of the problems affecting the criminal justice system has been a lack of proper co-operation between the police and the prosecution authorities in investigating crime. The autonomous character of the Prosecution Service and the sharp separation between the prosecution and the executive, without any checks and balances, created little incentive for co-operation between the two institutions. This was particularly evident in the investigation of organized crime.<sup>123</sup>

<sup>122</sup> Of course, the Prosecution Service would deny this, and there is little academic investigation of the issue as yet, but the circumstantial evidence is abundant. In some cases, the Prosecution has opened investigations against members of outgoing governments after they lost or as they were about to lose power, as happened before the elections in 2001. An even clearer example of such abuse was the opening of an investigation on charges of espionage against the outgoing Minister of Foreign Affairs and the Minister of Finance in July 2005. This took place shortly after the elections, during a period of coalition negotiations for a new government in which the two ex-ministers were actively pursuing ministerial positions. The accusations were clearly groundless. Despite the fact that they were not charged, no substantial evidence had been uncovered, and by law, investigations are confidential in the early stages, the media was officially informed that an investigation had been opened from the very start. The investigation was widely covered by the media at a time when negotiations for the new cabinet were being held.

As a further example of abuse, in 2002 the Ministry of Justice was pursuing a policy of judicial reform, and prosecutorial reform was clearly on the agenda. To thwart this, the Prosecution Service opened an investigation against the deputy Minister of Justice for a decision he made while a judge prior to becoming deputy minister. Inquiries were also made by the Prosecution Service into the Minister of Justice's activities as a judge. Neither was ever prosecuted; the inquiries were clearly meant to intimidate, and in fact succeeded in diluting the reform efforts. In October of 2004, for example, the draft amendments to the Criminal Procedure Code introduced by the Ministry of Justice and the Council of Ministers were rejected by the majority in Parliament; it is very unusual for the majority to veto its own government's actions.

<sup>123</sup> Research conducted by a team from the Ministry of Justice of Bavaria implementing a joint EU PHARE project concluded that "the interaction between the police and the public prosecutor's offices is completely insufficient." Second Quarterly Report, Twinning Project No BG/2000/IB/JH/01

Until 2004 there were open disagreements between the police and prosecution, with representatives of the two institutions criticizing each other in the media. The Prosecution Service's major complaints were that it was not kept informed of investigations carried out by the police and that evidence collection was sub-standard, while police complained that the prosecution did not react to their investigative priorities and significantly delayed high-priority investigations.

Despite continued mistrust between police and the Prosecution Service, the public antagonism has largely ended, as both services came to realize that such public confrontation was detrimental to both institutions. Most recently, the police and the prosecution have taken a different tack in their public statements, declaring that cooperation has been good. This has resulted in part from the creation of three-member teams, including a police officer, an investigator, and a prosecutor, to work together on cases under the relatively recent Guidelines on Investigation.<sup>124</sup> There is wide agreement among police and prosecutors that this has been a positive experience and has improved cooperation.

The new Criminal Procedure Code also addressed the problem of cooperation between the services by underlining the leading role of the prosecutor in the investigation. Under the new rules, he is in charge of the investigation from the start and gives instructions to the police. The current heads of the Ministry of the Interior and the Prosecution have similar backgrounds and a good personal relationship. There is also increased willingness to demonstrate that the system works, as a result of great pressure from the EU. Nevertheless, in the critical field of investigating and prosecuting organized crime and corruption, where cooperation between police and prosecution is crucial, there has been no visible improvement.

Before the adoption of the new Criminal Procedure Code in 2006, the police had a dual function with respect to crime investigation: they assisted the Investigation Services in investigating serious crimes, and they were the principal authority competent to investigate the majority of conventional crimes.<sup>125</sup> There are at present about 1,100 police investigators (*doznateli*),<sup>126</sup> who are responsible for all field work in the investigation of petty and average offenses,<sup>127</sup> as well as for expedited criminal

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Strengthening the Public Prosecutor's office.

124 *Guidelines on Investigation*, St. Gaz. No. 31/2004. These guidelines replicate to a large extent the investigation procedure set forth in the Criminal Procedure Code and include some guidelines on cooperation between police, investigators and the prosecution.

125 Until 1999, the police did not have formal investigating powers, but instead conducted investigations under the direction of the Investigation Services. The 1999 criminal procedure reform transferred the majority of investigative work to the police and closed the regional investigation services, leaving the Investigation Service in charge of serious crimes. The 2006 Criminal Procedure Code made almost all investigations, including more serious crimes, the responsibility of the police.

126 The Ministry of Interior is secretive about providing figures on personnel, which are considered a state secret. The number 1,100 was quoted by Minister of Interior Petkanov in an interview with the *Standard* newspaper on October 20, 2005.

127 Criminal Procedure Code, Art. 171 (detailing the crimes for which the police investigators are competent and the crimes for which the Investigation Service is competent).

proceedings.<sup>128</sup> In all cases, police investigators work under the guidance of the relevant prosecution office.

As of April 2006, the relationship between the Investigation Services and the police changed substantially, with the role of the investigators significantly diminishing. They are now in charge of investigating only crimes committed by police and army personnel, people with procedural immunity from prosecution, espionage, and crimes against humanity.<sup>129</sup> As there are practically no espionage crimes or crimes against humanity, the only real job investigators have is investigating army and police officers and other prosecutors, judges, and members of Parliament. All other crimes are now investigated by the police. The number of *doznateli* is expected to increase to more than 2,000.

Police officers are subordinate to prosecutors in investigating criminal offenses (though not in their more common patrol work); the police must carry out any investigation ordered by the prosecutor, and the prosecutor may also investigate on his own.<sup>130</sup> The authority of the Prosecution Service is not limited to prosecuting and presenting the case before court, but includes opening and directing the course of an investigation or indicating what evidence needs to be collected. As the decision to submit a case to the court is made by the prosecution, the police usually submit a file to the prosecution when their investigation is finalized.<sup>131</sup> This includes a conclusion as to whether there is sufficient evidence of a crime or not.<sup>132</sup> Such recommendations, however, are not binding on the prosecutor.

Under the 2006 Criminal Procedure Code, police are obliged to inform the prosecutor within 24 hours of any criminal investigation that is opened.<sup>133</sup> This requirement was designed to overcome the lack of cooperation between prosecutors and police and to guarantee good quality evidence from the start. Also, the lack of sufficient involvement by the prosecution service in the investigative phase had been criticized by the EU. The number of prosecutors was increased to meet the new responsibilities. This reform goes against the established institutional culture, however, and it remains to be seen whether it will be successful.

*The Investigation Service:* The Investigation Service, somewhat similar to the French investigating magistrate, is part of the Judicial Authority and governed by the SJC. Investigators are lawyers with the same training as prosecutors and judges. Until re-

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128 Expedited criminal proceedings are aimed at disposing of proceedings in petty crime cases; such proceedings can be carried out if there is sufficient evidence to proceed to trial within seven days of opening a criminal investigation. Criminal Procedure Code, Art. 408 (a).

129 Criminal Procedure Code, Art. 194, St. Gaz. 86/2005 (effective as of April 29, 2006).

130 Prosecutors may issue instructions to investigators and to police investigators, Criminal Procedure Code, Art. 197; Criminal Procedure Code, St. Gaz. No. 86/2005 (effective as of Apr. 29, 2006). They may also conduct investigations alongside or instead of the police or investigators and could also replace the police officer or the investigator. Criminal Procedure Code, Art. 196.

131 As police investigation was only introduced in 1999, and as there has been little research into the functioning of the criminal justice system, there is no data on the involvement of the prosecution in police investigation prior to closure of the investigation. Anecdotal information suggests that the prosecution's role is small.

132 Criminal Procedure Code, Art. 222, 223, St. Gaz. No. 86/2005 (effective as of Apr. 29, 2006).

133 Criminal Procedure Code, Art. 212 § 3, St. Gaz. No. 86/2005 (effective as of Apr. 29, 2006).

cently, the Investigation Service had broad investigative powers, and was generally responsible for the more legal aspects of investigative work.

The existence of the Investigation Services was one of the main points of criticism by the EU, since the process of investigation went through three different institutions—the police, the investigation services, and the prosecution—resulting in complications and delays. One of the EU's conditions was the streamlining of the investigation process, and the understanding was that the Investigation Services would be abolished. This was essentially accomplished with the adoption of a new Criminal Procedure Code effective in May 2006.<sup>134</sup> The new Code transferred all investigation to the police, leaving the Investigation Service in charge only of crimes committed by military and police personnel, espionage, and crimes against humanity. The major component of the reform is to transfer all investigative authority to the police and give full powers to control the investigation to the Prosecution Service. These amendments were not welcomed by the Prosecution Service, which had been vying with the police for control over investigators, but it did not object publicly. The Prosecution Service's only public comment was that it would require increased resources in terms of personnel and finances to perform its new role of overseeing every investigation from its start.

*Other investigative bodies:* There is only one other investigative authority within the executive: Customs has limited investigative powers, similar to those of the police, with respect to some customs offenses.<sup>135</sup> There was some discussion about giving the Ministry of Finance authority to investigate tax fraud, but this did not occur. As it stands, if the tax authorities establish evidence of a crime in the course of auditing a company, they must submit the case to the prosecutor, who will start an investigation.<sup>136</sup>

There is also the Financial Intelligence Agency, which receives information from banks and other financial institutions; if it finds certain information suspicious, it reports it to the Prosecution Service.<sup>137</sup> If the Prosecution Service decides there is reasonable suspicion, it opens an investigation and assigns it to the police to investigate. There have been complaints by the Prosecution Service that the Financial Intelligence Agency submits too many groundless cases.<sup>138</sup> The EU has been very critical of the fact that there are no convictions for money laundering in Bulgaria.<sup>139</sup>

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134 Criminal Procedure Code, St. Gaz. No. 86/2005 (effective as of April 29, 2006).

135 Criminal Procedure Code, Art. 48 § 2, St. Gaz. No. 89/1974, last amended by St. Gaz. No. 86/2005.

136 Tax P. Code, Art. 35 § 2, St. Gaz. No. 105/2005.

137 Measure against Money Laundering Act, St. Gaz. No. 85/1998; St. Gaz. No. 31/2003.

138 *The Prosecution will investigate the Financial Intelligence*, Mediapool, January 12, 2006.

139 *The EU wants convictions for money laundering*, Mediapool, March 1, 2006.

#### 4.5. Relationship with the judiciary<sup>140</sup>

As magistrates, prosecutors, investigators, and judges are governed by the same body, the Supreme Judicial Council. The Supreme Judicial Council has management and supervisory powers over the three institutions of the Judicial Authority and over individual magistrates.<sup>141</sup> The Supreme Judicial Council manages the budget, determines the number of prosecutors, and appoints, promotes, and dismisses prosecutors, as well as disciplining them and determining their immunity from criminal liability.

The Supreme Judicial Council consists of twenty-five members.<sup>142</sup> Members must be lawyers with high professional and moral qualities and at least fifteen years' professional experience, of which not less than five years should be as a judge, prosecutor, investigator, or tenured legal academic.<sup>143</sup> The National Assembly appoints eleven members of the Council, and the three institutions of the Judicial Authority elect another eleven at individual delegates' meetings: judges elect six members, prosecutors three members, and investigators two members, each from their own ranks.<sup>144</sup> The Prosecutor General and the Presidents of the Supreme Court of Cassation and the Supreme Administrative Court are members of the Council *ex officio*.<sup>145</sup> Members of the Council may not be members of Parliament, mayors, municipal councilors, or members of political organizations or parties, or trade unions (except those representing the judicial system).<sup>146</sup> Members serve single five-year terms, and may not be re-elected.<sup>147</sup> The sessions of the Supreme Judicial Council are convened and chaired by the Minister of Justice, who, however, may not vote.<sup>148</sup> One fifth of the members of the Council can also convene a session of the Council.<sup>149</sup> The Council usually meets once a week.

The Supreme Judicial Council nominates the President of the Supreme Court of Cassation, President of the Supreme Administrative Court, and Prosecutor General to the State President.<sup>150</sup> The Council also determines territorial jurisdiction and the seats of courts and prosecution offices, determines the overall number of prosecutors

<sup>140</sup> The Prosecution Service's relationship with the judiciary is largely mediated through their joint governing institution, the Supreme Judicial Council, which also has authority over investigators. This section consequently focuses on the Council; its contents are generally also relevant to the relationship between investigators and prosecutors.

<sup>141</sup> The organization and the activities of the Supreme Judicial Council, the courts, the Prosecution Service, and the Investigation Service, and the status of magistrates are all regulated by the Judicial System Act, St. Gaz. No. 59/1994.

<sup>142</sup> Judicial System Act, Art. 16 § 1, St. Gaz. No. 59/1994.

<sup>143</sup> Judicial System Act, Art. 16 §1, St. Gaz. No. 59/1994.

<sup>144</sup> Judicial System Act, Art. 17, St. Gaz. No. 59/1994.

<sup>145</sup> Judicial System Act, Art. 16, §2, St. Gaz. No. 59/1994.

<sup>146</sup> Judicial System Act, Art. 16 §4, St. Gaz. No. 59/1994.

<sup>147</sup> Judicial System Act, Art. 21, St. Gaz. No. 59/1994.

<sup>148</sup> Judicial System Act, Art. 26, St. Gaz. No. 59/1994.

<sup>149</sup> Judicial System Act, Art. 26 § 6, St. Gaz. No. 59/1994.

<sup>150</sup> The President may refuse to appoint an individual nominated by the Supreme Judicial Council, but if the Council nominates the same person a second time, the President must appoint him. Judicial System Act, Art. 27 §1(1), St. Gaz. No. 59/1994.



and judges, appoints, promotes, demotes, moves, and dismisses magistrates, and sets the remuneration for magistrates.<sup>151</sup>

The joint management of judges, prosecutors, and investigators has not been particularly successful. At times, there have been substantial tensions between members of the different institutions represented on the Supreme Judicial Council, most especially between judges and prosecutors. This had led to a rather difficult working environment for the Council and has reduced its efficiency. This joint governance of the courts, prosecution, and investigation has also been criticized as having the potential to compromise judicial independence.<sup>152</sup>

An additional major defect of the current system has been the lack of any accountability mechanisms. The Supreme Judicial Council has no obligation to report to any other institution of Parliament or the executive. As the Council represents the institutional interests of the Prosecution Service, the judiciary, and the Investigation Service, it has no incentive to insist on proper reporting and public accountability of those institutions. Attempts by various members of the Council to promote more effective institutional accountability have usually devolved into factional infighting.

The courts, the Prosecution, and the Investigation Services are required by law to submit statistical information to the Minister of Justice, who in turn is expected to submit it to the Supreme Judicial Council.<sup>153</sup> However, there is no independent check on the accuracy of these reports, which often do not even match, so that the effect of such reporting on public awareness and confidence is not substantial. Since April 2004, the Council has had an obligation to make public most of its sessions, as well as most reports submitted to the Council.<sup>154</sup> The Council originally resisted this requirement, but a challenge by a group of journalists led the Supreme Administrative Court to rule that the SJC must allow access to journalists.<sup>155</sup> Following this ruling, the SJC installed cameras in the meeting hall and television screens in another hall for journalists. On very rare occasions, the SJC will hold a closed session without providing a reason, but as a rule, sessions are public.

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151 Judicial System Act, Art. 27 §1(1-15), St. Gaz. No. 59/1994.

152 Commission of the European Communities, *2002 Regular Report on Bulgaria's Progress Towards Accession*, EUROPEAN COMMISSION REGULAR REPORT, 2002, Brussels, Oct. 9, 2002 <[http://europa.eu.int/comm/enlargement/report2002/bu\\_en.pdf](http://europa.eu.int/comm/enlargement/report2002/bu_en.pdf)>.

153 Judicial System Act, Art. 35, St. Gaz. No. 59/1994.

154 Judicial System Act, Art. 27 §3, St. Gaz. No. 59/1994 reads: "The sessions of the Supreme Judicial Council shall be public, except when deciding issues under sub-para. 6 and 7" (disciplinary proceedings and lifting immunity from criminal prosecution).

155 Judgment No. 9595 of Nov. 19, 2004 of the Supreme Administrative Court.

## V. Publicizing the Prosecution Service's Activities

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In the seventeen years since the change of system, the Prosecution Service has become more sophisticated in addressing the public and using the media to make its case. Prosecution offices have appointed spokespersons to provide information to the media, while individual prosecutors have also begun using the media more professionally to present their institutional interests to the public. There has also been a clear tendency towards increasing the amount of information presented to the public.

Besides information on its activities, the Service has consistently pressed two lines of argument in its public pronouncements: the need to preserve its autonomous status, and the need to increase or restore its powers. The Service depicts itself as fighting corrupt government officials and therefore needing to preserve its autonomous status; any suggestions for increased accountability are rejected as a threat to the institution's independence, which if carried out would undermine its ability to investigate government abuses. In addition, prosecutors have pressed to have certain powers returned to them or have argued for new powers, with the specific powers they have asked for changing over the years. Thus, the Service has argued for the power to order pre-trial detention and electronic surveillance, managerial powers over investigators, making investigators part of the Service, and the power to challenge the legality of privatization deals in civil proceedings.



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# Report on the *Ministerio Público* and the Reform of Prosecution in Chile

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Todd Foglesong



## I. General Issues

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In December 2000, the Republic of Chile began replacing its old system of criminal justice with a new one intended to be fairer and more effective. In four separate stages between 2000 and 2004, the government gradually and methodically introduced new laws, institutions, and practices throughout the country's 13 regions. In June 2005, the reforms were implemented in the metropolitan region of Santiago, and the transition is now complete.

One of the chief innovations of the reforms is the establishment of the *Ministerio Público*, or National Prosecution Service. Before 2000, there was no office of the prosecutor. Instead, judges presented charges, conducted investigations, and then adjudicated questions of law and fact in closed proceedings.<sup>1</sup> Unlike in France and Spain, where a functional and professional distinction emerged between different judges who investigated, prosecuted, and adjudicated, the judiciary in Chile remained integrally inquisitorial. Today, however, a prosecutor (*fiscal*) is responsible for reviewing complaints of crime, deciding whether or not to move forward with formal charges and how, and then supporting an accusation in an open proceeding whose outcome is decided by a judge.

The creation of the prosecution service in Chile was part of a grand transformation of the system of criminal justice, a reform of a scale and significance unmatched anywhere else in Latin America today and possibly the world. In addition to the new prosecution service, the government established a national public defender's office, as well as special judicial chambers (*juzgados de garantía*) that supervise all pre-trial activities and decisions taken by the prosecution, new court proceedings for the disposition of minor offenses and uncontested criminal charges (*procedimiento monitorio, abreviado*), two types of bench trials in ordinary cases (*ordinario, simplificado*), and, most elaborately, oral trials (*juicios orales*) adjudicated by three professional judges for a small number of major crimes. The operation of these institutions is guided by a code of criminal procedure whose core rules and values differ greatly from those of its predecessor.<sup>2</sup> It is widely agreed in Chile today that the practice of criminal justice now bears little resemblance to the mixed inquisitorial system in operation before 2000.

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1 The main features of the unreformed judiciary are described in Lisa Hilbink, *An Exception to Chilean Exceptionalism? The Historical Rule of Chile's Judiciary*, in WHAT JUSTICE, WHOSE JUSTICE: FIGHTING FOR FAIRNESS IN LATIN AMERICA (S.E. Eckstein & Timothy P. Wickham-Crowley, eds., 2003). For an overview of Chile's justice system as a whole, see *Reporte sobre el Estado de los Sistemas Judiciales en las Américas, 2002-2003*, available at [www.cejamericas.org](http://www.cejamericas.org).

2 For an account of some of these differences, see Rafael Blanco, Richard Hutt & Hugo Rojas, *Reform to the Criminal Justice System in Chile: Evaluation and Challenges*, 2 LOYOLA INTERNATIONAL LAW REVIEW (2005), at 253.

The reforms in Chile have greatly influenced the contours of change in justice in much of Latin America, including Venezuela, Columbia, Peru, the Dominican Republic, and at least one state in Argentina (Cordoba). Reforms in these places drew heavily on Chile's new code of criminal procedure, and yet have not produced a comparable political and institutional transformation of criminal justice. In these places, new codes have remained almost exclusively legal transitions. It is no surprise, then, that in Mexico today, leaders of state governments and some federal agencies look to Chile for inspiration and reassurance as they consider remaking their own justice systems.

### *The Reasons and Rationales for Reform in Chile*

The original impulse for the reforms in Chile was to protect the rights of defendants and reduce the discriminatory impact of criminal justice on the poor. These reasons, however, are no longer prominent in public discussions. They have been overtaken and to some extent displaced by a very different political rationale for change. Today, the main goal and expectation of criminal justice in Chile is to ensure public safety.<sup>3</sup>

Introducing the draft code of criminal procedure in 1995, then-President Eduardo Frei made the goals of protecting constitutional rights of defendants transparent and prominent:

*The sector of the State in which the abuse of power tends to manifest itself most is the system of criminal justice. The victims of such daily infractions of the rights of persons tend to be the sectors that the processes of modernization exclude, making them extremely vulnerable. . . . [T]he number of arrests made by the police is greater than the number of cases that enter the jurisdiction of the judiciary, which means that there are forms of social criminal control at the margins of the supervision of judges and persons subjected to the rigor of the overall criminal justice system without ever having been charged.<sup>4</sup>*

Frei also insisted that the new system must reduce the negative impact of criminal justice on the poor:

*By effectively discriminating against the sectors of society that are most vulnerable and not employing effective forms of reinsertion, the system of criminal justice in Chile produces marginality. . . . each subject that is brought into the system of criminal justice and who suffers entry into the circuit of marginality, is an immense loss of social investment and public effort. The reform to the criminal process should correct this road to marginality, permitting, through the intervention*

3 For an example of the expectations placed on justice by the candidates in the recent presidential election, see the comments recorded by Paz Ciudadana, an NGO in Santiago that studies victimization and public perceptions of crime, at [www.pazciudadana.cl/comunicados.ph](http://www.pazciudadana.cl/comunicados.ph).

4 For the text of the President's message see *Mensaje de S.E. El Presidente de la Republica con el que inicia un proyecto de ley que establece un nuevo codigo de procedimiento penal* (June 9, 1995), available at [www.ksg.harvard.edu/criminaljustice](http://www.ksg.harvard.edu/criminaljustice).

*of the Ministerio Público, the encouragement of social and economic re-incorporation of those that enter the system.*

These two goals of protecting rights and reducing marginality drew strength from the movement that ousted the military regime of General Augusto Pinochet and amended the Constitution at the end of the 1980s. But, partly because of their political delicacy, the ongoing efforts in Chile to prosecute generals and obtain justice for victims of the dictatorship have been deliberately kept distinct from efforts to reform the criminal justice system.<sup>5</sup> And as others have shown, the movements for justice, social democracy, and the rule of law in Chile have run on separate tracks.<sup>6</sup>

In addition, the two founding hopes for the new system of criminal justice were not strong enough to produce the requisite political consensus for the reforms, which proved very expensive.<sup>7</sup> To forge broad political support for such an investment, the reforms had to be marketed as a means of social “modernization,” a word used in nearly every paragraph of the speech of then-President Frei, and a word that is commonly associated in Chile today with crime.

*If to modernize the State means to submit the management of its diverse institutions to criteria of efficiency in practice and design, then the modernization of the State requires the reform of criminal justice . . . The reform we propose will translate into a social gain for those who are victims of criminal behavior. . . . By launching this draft, we will be investing in legitimacy, in human rights, and in security.*

Gradually, the goals of eliminating inequity and protecting defendants’ rights have been eclipsed by a growing preoccupation with public safety in Chile. Although improving public safety was an important issue in the public debate even before the reform,<sup>8</sup> today, politicians demand that justice respond to public fear of crime more often than they praise its defense of rights and liberties.

The prosecution service initially took refuge from these countervailing pressures in its enviable constitutional independence and organizational autonomy. In the first years of the reform, the prosecution service in Chile was silent about both the original reasons for reform and the growing public expectations that it play a leading

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5 Faviola Letelier, the sister of the Chilean Ambassador to the US, Orlando Letelier, who was murdered in Washington D.C. in 1976, said after a speech in New York in October 2003 that “there is no relationship” between the search for justice in cases stemming from the dictatorship and the current efforts to reform criminal justice in Chile. Personal exchange

6 See, e.g., Carlos Pena Gonzalez, *Economic and Political Aspects of Judicial Reform: The Chilean Case*, in *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW* (Erik Jensen & Thomas Heller eds., 2003), at 227.

7 Researchers at the Center for the Study of Justice in the Americas (CEJA) estimate the cost of institute the reforms at over 600 million US dollars, with an annual operating cost of approximately 250 million. See *Annual Report of Justice, 2004-2005*, available at [www.cejamericas.org](http://www.cejamericas.org). CEJA is a regional non-governmental organization supported by the Organization of American States to provide advice and assistance to states and societies in Latin America.

8 Carlos Rodrigo de la Barra Cousino, *Chile: Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile*, 5 *SOUTHWESTERN JOURNAL OF LAW AND TRADE IN THE AMERICAS* (1998), at 326.

role in strengthening public safety. For example, in an early draft of a report on the prosecution service that the Vera Institute of Justice in New York prepared for the Division of Research of the *Ministerio Público* in 2003, a reference to President Frei's speech of 1995 was deleted, apparently at the request of the Chief Prosecutor. Only after the discovery of the greater punitive force of the new system of justice did the Director of the Prosecution Service agree to publish the report, which included the rate of convictions under the new regime.<sup>9</sup>

More recently, influenced by rising concern about crime,<sup>10</sup> and also by surveys that show confidence in government diminishing,<sup>11</sup> the *Ministerio Público* has felt pressure to be demonstrably tough on crime.<sup>12</sup> Still, it is not clear how the *Ministerio Público* will respond. The *Ministerio* does not yet have a crime reduction strategy, nor does it have a strategy for improving public perceptions of the reform in these terms. It has not decided if it should accept responsibility for problems, such as crime and public confidence, over which it has incomplete control, or instead focus even more narrowly on the proper application of the law to each of the individual cases with which it is presented. In the meantime, prosecutions remain focused on individual cases rather than the accomplishment of broad outcomes or the fulfillment of the hopes and expectations that accompanied the reforms.

As this report shows, the extreme degree of constitutional independence has not immunized the *Ministerio* from outside pressures. In fact, strict autonomy from other state agencies paradoxically makes the *Ministerio* susceptible to a more diffuse and perhaps ubiquitous set of public pressures and constraints. Increasingly, the *Ministerio* has to answer for social outcomes beyond the narrower, traditional role of applying the law in cases presented to it. Individual citizens increasingly assess the value of the justice system in terms of its ability to reduce and prevent crime and fear of crime. Lawyers and politicians analyzing the criminal justice system routinely ask: Is the system cost-effective? What are the benefits from our expenditures on a modern system of justice? What is the quality of service from well-paid civil servants and public officials? What is the return on our investment?

9 See Antonio Marangunic & Todd Foglesong, *Analizando la reforma a la justicia criminal en Chile: un estudio empirico entre el nuevo y el antiguo sistema penal* (2004), available at [http://www.vera.org/section9/section9\\_3.asp](http://www.vera.org/section9/section9_3.asp) and [www.ministeriopublico.cl](http://www.ministeriopublico.cl). The report is also available in English, at the same locations, as Charting Justice Reform in Chile: A Comparison of the Old and New Systems of Criminal Procedure.

10 See Table 1 in Section VI below for data on crime rates in Chile.

11 See, e.g., the report by the Communications Department of the Catholic University of Chile, *El 'Secreto del Secreto: La Confianza*, CUADERNOS DE INFORMACIÓN no.18 (2005), available at [www.uc.cl/fcom/p4\\_fcom/site/artic/20051212/pags/20051214222647.html](http://www.uc.cl/fcom/p4_fcom/site/artic/20051212/pags/20051214222647.html).

12 In personal discussion with the author of this report in April 2004 at a conference in Buenos Aires, Pablo Alvares, the executive director of the Chilean *Ministerio Público*, described crime reduction and public safety as the "next frontier" for the *Ministerio*.

## II. Structure and Organization of the Prosecution Service

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### 2.1. Internal structure

The prosecution service has three administrative levels, corresponding to the main territorial and administrative subdivisions of the unitary state. At the base are local prosecution offices (*fiscalía local*), each directed by a Chief Assistant Prosecutor (*fiscal adjunto jefe*). Above this are 16 regional prosecution offices, each led by a Regional Director of Prosecution. At the apex of the system is the Director of the Prosecution Service, or *Fiscal Nacional*. In all, there are 625 prosecutors, all of whom, except the *Fiscal Nacional*, work in regional or local offices. At the national level, employees of the *Ministerio Público* are engaged in administration and management, not prosecution.

At both the regional and national prosecution services, daily operations are managed by an executive director. Typically, this person is an engineer, economist, or expert in human resources and management. Taking direction from the *Fiscal Nacional*, the executive director manages several administrative units, including those for Assistance to Victims and Witnesses, Research and Evaluation, Information Systems, Finance, and Internal Affairs. Line prosecutors, including those in specialized units for drug offenses and sex crimes, are supervised directly by the Chief Assistant Prosecutor in each region.

### 2.2. Budgetary process

The *Ministerio Público* negotiates its budget with the Treasury before a proposed amount is forwarded to the legislature. The *Ministerio Público* makes its annual expenditure projections based on draft budgets submitted by regional prosecution offices, whose sums it may change. It is unclear if allocations to the service as a whole or to the regional offices are conditional upon performance or pegged to the annual increments received by other institutions, such as the judiciary or public defense.<sup>13</sup> Although this process is not public, the process by which the budget is produced can be openly acrimonious. Competitors for funding—such as the National Office of Public Defense—allege that their counterparts' requests are "inflated" and "unequal."<sup>14</sup> It is difficult to settle these claims in the absence of common benchmarks and transparent information about the budget process.

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13 The proposal for 2005 would give the *Ministerio Público* about a third of what the judiciary will receive, and slightly more than the sum designated for the legislature, available at [www.dipres.cl](http://www.dipres.cl).

14 Interview with Sofia Libedinsky, former chief of cabinet of the Office of Public Defense, March 30, 2003.

### 2.3. The status of the Prosecutor General and senior Regional Prosecutors

The *Fiscal Nacional* is appointed by the President and confirmed by the Senate in a special session; the President must select someone from a list of five candidates nominated by the Supreme Court and generated through an open public competition.<sup>15</sup>

The *Fiscal Nacional* can also issue instructions (*instructivos*) and orders (*oficios*) to prosecutors on the interpretation and application of the law as well as on internal organizational matters.<sup>16</sup>

The *Fiscal* is not answerable to any institution within the *Ministerio Público*. There is a General Council (*Consejo General*), composed of the Regional Directors of Prosecution, which meets at least quarterly.<sup>17</sup> The Council is an advisory and consultative body. There are no arrangements for voting, and the views expressed by its members are not binding. The Council serves as a sounding board for the *Fiscal Nacional*, and a forum at which prosecutors resolve managerial issues (such as how or whether to organize special units for money laundering cases), rather than a control mechanism for monitoring implementation and compliance with policies.<sup>18</sup>

*Regional Prosecutors:* Below the *Fiscal Nacional* are 16 Regional Directors of Prosecution, one for each of the twelve regions and four in the Metropolitan Region of Santiago. Regional Directors of Prosecution are appointed for a non-renewable period of ten years; retirement at age 75 is mandatory.<sup>19</sup> The *Fiscal Nacional* appoints Regional Directors from a short list of five applicants forwarded by each regional Court of Appeals following an open public competition.<sup>20</sup>

The competition in 2004 for the four positions of Regional Director in Santiago was controversial. The interviews with candidates were conducted privately by judges on the Court of Appeals; this was followed by a public hearing at which, reportedly, no questions were posed. Then, instead of holding open competitions for all four positions simultaneously, which would have maximized the pool of possible candidates, the Appeals Court forwarded four nominations to the *Fiscal Nacional* for each position separately. For each position, the *Fiscal Nacional* picked one candidate, and thus the pool of candidates for each subsequent competition only grew by one. In the end, the names of no more than six candidates were actually considered.<sup>21</sup>

15 The current *Fiscal* was one of 20 applicants for the position, as was the present Minister of Justice.

16 See Section 3.1 below.

17 *Ley Orgánica Constitucional del Ministerio Público* [Constitutional Law on the *Ministerio Público*], no.19.640 [hereinafter *Law on the Ministerio Público*], Art. 24, 25.

18 See *Tercera Cuenta Pública* (Apr. 2002), available at [www.ministeriopublico.cl](http://www.ministeriopublico.cl) (describing issues addressed at the Council in 2002).

19 Law on the *Ministerio Público*, Art. 30.

20 Law on the *Ministerio Público*, Art. 29.

21 This account of the process came from a personal interview with one of the unsuccessful candidates.



## 2.4. The status of individual prosecutors

Chief Assistant Prosecutors—that is, prosecutors in charge of offices below the level of region—as well as Assistant Prosecutors (*fiscales adjuntos*) are appointed by the *Fiscal Nacional* upon a motion by a Regional Director of Prosecution. These legal officers must be over thirty years of age and have practiced law for at least five years. At first glance, they appear to have greater security of tenure than their superiors; Assistant Prosecutors enjoy life tenure until the age of 75.<sup>22</sup> However, prosecutors may be removed from office for negligence or immoral behavior, largely at the discretion of their superiors. There is no published information about the number of these officials who have been removed.

Line prosecutors are evaluated (*calificado*) by Regional Prosecutors twice annually, often on the basis of a “pre-evaluation” conducted by the Chief Assistant Prosecutor.<sup>23</sup> There is no information about the criteria used in these evaluations, although interviews with prosecutors suggest that they are invented as they go along.<sup>24</sup>

Prosecutors may receive an annual bonus of 1.5 times their monthly salary, based on collective accomplishments of the office in which they work as a whole. These achievements are also measured in administrative terms—such as the installation and proper use of case management software systems and the degree of internal organization. Creating more objective and useful criteria for performance evaluations—such as the relationship between inputs and outcomes—is an important priority for the Management and Research Division of the national office of the prosecution service.<sup>25</sup>

In addition to the relatively extensive set of accountability mechanisms to which prosecutors’ performance is subject (see next section), prosecutors’ personal political liberty is considerably circumscribed. They are prohibited from engaging in any political activity, such as union membership or participation in political rallies, other than voting.<sup>26</sup> Apparently most prosecutors abide by this prohibition.

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22 Although the meaning of this provision has yet to be tested in court, it would appear that a senior prosecutor could, in the ninth year of his appointment, request to be transferred to the position of assistant prosecutor, and thereby receive life tenure.

23 This account of evaluation rests heavily on interviews conducted by Mirna Goransky, an independent Argentinean researcher and senior prosecutor at the Federal Office of the Procuraduría General, Argentina (on leave) studying the implementation of the reforms in Chile. Interview, March 14, 2003.

24 One prosecutor in a northern region relayed that his boss not only invented the test questions, but also established three units of measurement—“above expected performance,” “within expected performance,” and “below expectations.” Our informant was unsatisfied with the rating he received—within expected performance—and unimpressed with the objectivity of the exercise. “When I asked the chief why he had ranked me so, he said: ‘When I hired you I thought you were the best of the candidates, and you’ve shown that you are the best, so that’s why you’re within expectations.’” See below, Section 2.5.

25 Interview with Antonio Marangunic, Director of Research and Evaluation, *Ministerio Público*, Santiago, Chile (Nov. 2005).

26 Law on the *Ministerio Público*, Art. 63.

## 2.5. Individual accountability of prosecutors

Prosecutors can be held accountable for their performance in a number of ways. No prosecutors are privileged by the special immunity from criminal prosecution enjoyed by Congressmen or Ministers of State. The only special provision for handling criminal accusations made against a prosecutor is that a prosecutor of a higher level must direct the investigation. This appears to apply to all criminal actions, whether committed in the course of professional duties or outside of them. Prosecutors are also subject to disciplinary, civil, and criminal proceedings for actions arising out of their work and in their private life, just like any other member of society.<sup>27</sup>

*Disciplinary Proceedings:* Prosecutors may be subject to internal disciplinary proceedings. A Regional Prosecutor can appoint an investigator and then preside over a hearing in which he may sanction or remove a prosecutor from office for negligence in the execution of formal duties or for “deeply immoral” behavior in private life.<sup>28</sup>

If an accusation is made against an assistant prosecutor by a member of the public or another official of the *Ministerio Público*, the supervising Regional Director of Prosecution must designate an investigator from among his colleagues and then adjudicate the dispute.<sup>29</sup> Grounds for dismissal include: physical incapacity; bad behavior or manifest incapacity in the exercise of his duties; lack of probity, insults, or grave immoral conduct; unjustified absence from work or leave without appropriate prior notification, if it caused grave damage or delay in the administration of justice.<sup>30</sup> Possible sanctions include private admonition, written censure or reprimand, a fine equivalent to half a month’s salary, suspension for up to two months at half pay, and dismissal.

*Performance Evaluation:* Assistant Prosecutors can be removed from office by a Regional Prosecutor for poor performance evaluations. Performance evaluation consists of an individual report by the Regional Director, with the collaboration of the Chief Assistant Prosecutor with direct supervisory responsibility. In this report, each prosecutor receives a grade on a scale of one to seven in different categories, such as oral and written skills, leadership, commitment, punctuality, and professional comportment; the grade received greatly influences a prosecutor’s possibilities for career advancement.<sup>31</sup>

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27 Law on the *Ministerio Público*, Art. 45–46.

28 Law on the *Ministerio Público*, Art. 49.

29 Law on the *Ministerio Público*, Art. 51.

30 The grounds for dismissal of the Regional Directors of Prosecution or the *Fiscal Nacional* are more limited (incapacity, bad behavior or manifest negligence in the exercise of their duties), and the procedures by which charges are investigated and adjudicated differ. In the case of an accusation against the *Fiscal Nacional*, a Regional Director of Prosecution is chosen by lottery to oversee the proceedings; in the case of an accusation against a Regional Director of Prosecution, another Regional Director is designated by the *Fiscal Nacional* to oversee the proceedings after prior consultation with the General Counsel.

31 Interviews with line prosecutors in Temuco and Antofagasta, Chile (May 2003).

Many prosecutors and several Chief Assistant Prosecutors have complained about extreme subjectivity in the performance evaluation process.<sup>32</sup> The scale used to assign grades incorporates categories such as “above expected performance” or “below expectation.”<sup>33</sup> One Chief Assistant Prosecutor alleged that there is “no relationship” between the evaluation of administrative performance in these terms and the “outcomes.” His office ranked first in the country in terms of many critical performance indicators, such as speed of disposition, rate of conviction, and incidence of oral trials—aspects of work for which the region was commended by the *Fiscal Nacional*; yet on the individual performance evaluations, his staff was ranked somewhere in the middle.

There is no official data about the *incidence* of criminal, civil, or disciplinary proceedings against prosecutors, but it appears they are rare. In one case in the 9<sup>th</sup> Region, an assistant prosecutor was dismissed because his annual qualification grade was sufficiently low to recommend dismissal; his grade was based on several complaints presented by defense attorneys due to his handling of cases.<sup>34</sup> This assistant prosecutor filed a constitutional claim against the decision (*recurso de protección*) because of the absence of a prior disciplinary proceeding.

The possibility that this accountability regime and procedures for appointing prosecutors would encourage subservience aroused concern when the *Ministerio Público* was established. For example, a former President of the Supreme Court worried about the ability of the state to investigate the *Fiscal Nacional* for possible criminal behavior because one of his direct subordinates would be responsible for deciding whether or not to open a case and how to proceed.<sup>35</sup> However, while the procedures for removal (and appointment) create a potential for individual dependency, the possibility of such manifest corruption is probably mitigated by the strength of civil society, the legal profession, and the independent media. As many of the original legal scholars who backed the reforms now observe, the press is vigilant in reporting on all manner of personnel changes within the prosecution service.

## 2.6. Training

There are no mandatory training (*capacitación*) requirements for prosecutors. Before the introduction of the reforms, the *Ministerio Público* organized a series of short trainings, two to three weeks long, for each prospective prosecutor. Reportedly, the instruction was formulaic and didactic, which is typical of the system of legal instruction;<sup>36</sup> much of this training consisted of the exchange of documents rather than in-person communication.

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32 *Id.*

33 *Id.*

34 *Id.*

35 See *supra* note 30.

36 See Andres Baytelman, *Capacitación como futbol*, in IX APUNTES DE DERECHO (2002), at 22–31, also available at <http://www.cejamericas.org/doc/documentos/DocCap.Futbol-A.Baytelman.pdf#search=%22Capacitaci%C3%B3n%20como%20futbol%22>.

This is an issue on which the Director of Human Resources of the *Ministerio Público* acknowledges there is “room for improvement,”<sup>37</sup> and there are now a host of formal academic courses, on-the-job trainings, and refresher courses offered to improve the training of prosecutors; some of these are offered through the Judicial Academy, and some are offered through seminars organized by CEJA.<sup>38</sup> Some continuing education is mandatory.

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### III. Functions and Powers of Prosecutors

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#### 3.1. Prosecutorial functions in criminal justice

Prosecutors have a near monopoly on bringing charges in court. There are certain instances in which the *Ministerio Público* cannot commence investigations or prosecutions without a victim’s consent and formal complaint,<sup>39</sup> and there is also a small class of cases in which the participation of the *Ministerio* in criminal proceedings is prohibited.<sup>40</sup> In all other circumstances, however, the *Ministerio*’s control over prosecution is nearly complete.<sup>41</sup>

The *Ministerio Público* is required diligently to prosecute all cases it has commenced. However, this “compulsory principle” (“*obligatoriedad*” or “*legalidad*”) functions more as a recommendation than a rule,<sup>42</sup> and prosecutors routinely exercise considerable discretion on whether or not and how to proceed with cases. Prosecution is compulsory only for offenses punishable by more than two years in jail, and even this obligation only obtains if prosecutors decide to bring such charges, rather than lesser ones or none at all. Indeed, the most contentious aspect of the reforms was the power conferred on prosecutors to dispose of criminal complaints in a variety of administrative ways without judicial review.

*Administrative disposition:* Prosecutors use three main types of decisions to dispose of cases without charges: conditional dismissal (*archivo provisional*), the expediency

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37 Interview with the Director of Human Resources, *Ministerio Público*, in Santiago, Chile (May 2003).

38 See examples of course curricula at the website of the Center for the Study of Justice in the Americas, at [www.cejamericas.org](http://www.cejamericas.org).

39 These include cases of domestic violence, revelation of industrial or commercial secrets, and a limited category of injuries (*lesiones*). See *Código Penal* [Penal Code] [hereinafter *Penal Code*], Art. 399, 494. Withdrawal of a complaint in these cases only also results in the termination of prosecution.

40 For example, only private citizens can launch prosecutions in cases of slander (*calumnia*), insult (*injuria*), and forced marriages of minors, as well as certain bank-related crimes (the issuance of a check without sufficient cash).

41 This is balanced by the rarely used right of victims in all cases, and of organizations acting in the “public interest” in some cases, to act as private prosecutors (*querellante y acusador particular*) in parallel with the *Ministerio* or even replacing the state prosecutor, with the authorization of the judge.

42 See Mauricio Duce & Cristián Riego, *Introducción al nuevo sistema procesal penal, Volumen 1* (2002), at 171–194. See also Julia Fonda, *Public Prosecutors and Discretion: A Comparative Study* (1995).

principle (*principio de oportunidad*), and a decision not to initiate an investigation (*facultad de no iniciar investigación*).<sup>43</sup> Called “administrative outcomes,”<sup>44</sup> these measures are used when there is insufficient information to proceed or insufficient evidence to warrant a charge or expect successful further investigation or prosecution, when the conduct is not a criminal offense, or when prosecution is not in the public interest. The *principio de oportunidad* and the *facultad de no investigar* are final decisions, and the *facultad de no investigar* requires judicial approval.<sup>45</sup> Victims can ask the prosecutor to review a conditional dismissal, although such requests are not binding, and prosecutors can later reopen cases. Courts can also overturn these decisions upon the petition of a victim. However, it appears to be rare for victims to make such appeals, and even rarer for prosecutors to reverse their decisions.<sup>46</sup> Between two-thirds and three-quarters of all cases terminate in one of these three ways.<sup>47</sup>

Initially, much of this discretion was rigidly controlled through national-level *instruccion*, and prosecutors were uncertain about how to use their authority. There was considerable volatility in the portfolio of dispositions, and also a substantial increase in the share of administrative dispositions between the first and second year of the reforms.<sup>48</sup> Measured as a proportion of all closed cases, the proportion of these outcomes among all dispositions rose from 70 percent in 2001 to 78 percent in 2002. Proportionally, the greatest rate of growth was in the disposition that required consent from a judicial authority—the decision not to initiate an investigation.<sup>49</sup> These and other data suggest that it took at least a year for prosecutors to gain the confidence to make decisions that involved judicial review.

*Diversion:* Prosecutors can also elect not to file charges and divert cases that in their judgment do not warrant formal prosecution. Prosecutors may dispose of a case following a restorative agreement concerning restitution to the victim (*acuerdo reparatorio*), or may conditionally suspend proceedings upon a suspect’s promise to fulfill certain requirements over a period of time (*suspension condicional*); in the latter case, judicial authorization is required. Yet while penalties can be imposed for non-compliance, there is no affirmative obligation on the prosecutor to secure or monitor compliance, and few resources or other means by which to do it.

43 There is also the “decision not to continue” (*facultad de no perseverar*), which resembles the decision to archive a case after a judicial authority has intervened. See *Código de Procedimiento Penal* [Code of Criminal Procedure] [hereinafter *Code of Criminal Procedure*], Art. 249.

44 In Andrés Baytelman & Mauricio Duce, *Evaluación de la Reforma Procesal Penal. Estado de una reforma en marcha* (2003) these dispositions are called “desestimaciones” (“non-prosecutions”). The Ministerio Público uses the terms “administrative outcome” (*salida administrativa*) or “prerogative dispositions” (*terminos facultativos*).

45 Code of Criminal Procedure, Art. 168.

46 No data on the frequency with which victims object to these decisions either formally or informally is available; interviews with prosecutors suggest it is uncommon.

47 Baytelman & Duce, *supra* note 44, at 244. Because these outcomes are the norm, it is odd to refer to them as “exceptions” to the legality principle. See Duce & Riego, *supra* note 42, at 195

48 See Table 2 in Section VI below.

49 For example, in the 4<sup>th</sup> Region, between the third quarters of 2001 and 2002, there was a 370 percent growth in the use of *archivo provisional* and a 505 percent increase in the use of *facultad de no iniciar investigación*. See Ministerio Público, *Tercer Trimestre, 2002: Información Estadística del Ministerio Público* (2002), at 11.

Prosecutors do not divert a large proportion of cases, although the share is growing. One year into the reform, 1.3 percent of cases closed in the calendar year had been diverted, either through a conditional suspension or restorative agreements. Toward the end of 2001, the *Fiscal Nacional* issued an instruction relaxing the rules governing diversion and eliminating several conditions, including the requirement that a prosecutor obtain a report from the prison administration before approving a conditional suspension. By the end of 2002, 2.3 percent of all cases closed were disposed of through diversionary agreements.<sup>50</sup> This rate has grown steadily since then. Conditional suspension alone accounted for 3.8 percent of all dispositions in the first half of 2004.<sup>51</sup>

*Case Distribution and Assignment:* Case distribution is largely left to the discretion of each Chief Assistant Prosecutor, who is encouraged to distribute cases according to “objective criteria” such as level of experience and specialization.<sup>52</sup> As a consequence, practice varies according to location, office composition, and the individual personalities involved. In offices that organize prosecutorial staff according to offense type, with separate units for homicide, robbery, and sex and drug offenses, this distribution is straightforward; in small offices of this kind, where there is only one prosecutor for each type of offense, there is little room for selective distribution. In larger offices, however, and in units where the division of labor is not shaped by offense type, there is room for selectivity. In the 9<sup>th</sup> Region, for example, the executive director of the regional service encourages distribution of cases according to a scale of “complexity” as well as the “productivity” of individual prosecutors.<sup>53</sup>

The power to reassign cases is also a potential influence on prosecutorial behavior. The *Fiscal Nacional* can assume control of a case that has initially been assigned to a Regional Prosecutor. It does not appear that he can reassign a case from one prosecutor within a region to another, however, and even if it was legally possible to do so, this kind of involvement could only take place with the help of the Regional Director.

*Guided Instruction:* The *Fiscal Nacional* can issue instructions to lower-level prosecutors on the application of the law.<sup>54</sup> Conceived of as guidance (*orientación*), this influence takes the form of instructions (*instructivos*) and orders (*oficios*), which cover specific issues regarding organization of labor inside the *Ministerio Público*,<sup>55</sup> but also extend to general matters of legal interpretation. They are typically published and have both persuasive and binding authority. Prosecutors generally feel that these instructions are not merely guiding, but rather have been issued in response to a decision with which the *Fiscal Nacional* disagreed.<sup>56</sup>

50 *Compendio Estadístico, Ministerio Público* (Feb. 2003), at 9.

51 See the statistical report of activities for the first half of 2004, available at [www.minpublico.cl](http://www.minpublico.cl).

52 Law on the *Ministerio Público*, Art. 40.

53 Interview with Antonio Marangunic, then executive director of the Prosecution Service for the 9<sup>th</sup> Region (Mar. 2003).

54 For a list of the “instructions” (*instructivos*) issued by the Chief Prosecutor, see [www.ministeriopublico.cl/index.asp](http://www.ministeriopublico.cl/index.asp)

55 For example, the *Fiscal Nacional* has used instructions to clarify the rules and responsibilities of lower level prosecutors when they are summoned to appear in civil trials as witnesses.

56 See Duce & Riego, *supra* note 42.



For example, in one instruction from October 2000—that is, prior to the commencement of any official prosecutions under the reformed system—the *Fiscal Nacional* sought to shape the conception of the prosecutorial role, telling prosecutors that, contrary to what “some authors” had suggested, the legal duties and obligations with respect to victims should not be “interpreted as converting prosecutors into lawyers for victims.”<sup>57</sup> Although not considered jurisprudence or included in that section of the *Ministerio Público*’s website, this kind of instruction blurs the distinction between advice and command.

The volume of such instruction is considerable. Although the exact number of these instructions is unclear, the orders and instructions are generally lengthy, discursive documents, full of exhortation, direction, and stipulation of desired behavior. It would take further research to determine whether this guidance is becoming more common, more precise, or less didactic, or to measure the impact it has on prosecutors’ disposition and decisions.

### 3.2. Relationship with the judge at the pre-trial stage

After the period of military rule, during which many people were executed or detained for long periods of time without the right to communicate with family members, there was a strong interest in reducing the risk of abuse in pre-trial justice. One of the centerpieces of the reform therefore concerned a “shift in the paradigm” of preventive detention.<sup>58</sup>

The new code of criminal procedure introduced a presumption against detention that can be rebutted by a prosecutor upon a showing that alternative measures are insufficient to “assure a completion of proceedings” or to protect “the victim and society” from further danger, or that detention is “indispensable” to conducting certain aspects of the investigation. A judge may order pretrial detention if the information presented confirms the existence of a crime and “allows a grounded presumption” that the accused committed the offense.<sup>59</sup> However, such detention is restricted to serious crimes through a “proportionality” requirement, although there is no clearly defined penal threshold.<sup>60</sup> The new code also introduced a wide array of non-custodial measures of restraint (*medidas cautelares*) that would ensure the completion of proceedings, the safety of victims and society, and the proper conduct of investigations without detention.

These measures should reduce the discretion available to prosecutors in the suspect’s favor and give judges relatively more power in the decision-making process. Two

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57 See Oficio of Oct. 12, 2000, no.143, available at [www.minpublico.cl](http://www.minpublico.cl).

58 See Duce & Riego, *supra* note 42, at 244–245; Cristián Riego, *The Chilean Criminal Procedure Reform (1997)* (unpublished LL.M. thesis, University of Wisconsin, Madison) (on file with the Law Library, University of Wisconsin, Madison), at 8, 36–40 (analyzing legislation under the old pretrial detention system).

59 Code of Criminal Procedure, Art. 140.

60 Code of Criminal Procedure, Art. 141.



recent studies both concluded that there has been a “diminution” in the incidence of pre-trial detention as well as a “substantial rationalization” in its use; however, neither study has a sufficient empirical basis to allow a confident interpretation of trends in pre-trial detention.<sup>61</sup> Without a more clearly defined methodology, the *Ministerio Público*’s data will not contribute to meaningful assessment of the reforms’ effects.<sup>62</sup>

### 3.3. Powers outside the criminal justice system

The *Ministerio Público* has authority only in matters of criminal prosecution; the only role of the *Ministerio* is to assist victims of crime and to investigate and prosecute offenders. Some of the functions performed by a procuracy in other states are delegated to a council for the “defense of the state,” and to attorneys in municipal governments.

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## IV. Relationship of the Prosecution Service to Other Organs of the State

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### 4.1. The constitutional location of the prosecution service

Chile is a presidential republic. The President serves as both chief of state and head of the government for a period of six years and has considerable direct authority. The president appoints ministers to serve in a government to which he or she conditionally and partially delegates the administration of the affairs of state. Of the officials appointed by the President, only the members of the Supreme Court and the Director of the Prosecution Service must be confirmed by the legislature.

Despite its name, the *Ministerio Público* it is not a cabinet ministry. Nor is it part of the executive. Instead, it is a separate state institution with a distinct constitutional identity.<sup>63</sup> This arrangement has given the *Ministerio Público* considerable autonomy,

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61 The first study found that, depending on the region, the total number of detainees in 2002 was between 23 and 38 percent less than in 2000. See Patricia Arias Barriga & Gabriel Ríos Escobar, *Libertad Provisional y Prisión Preventiva*, in 5 REVISTA DE ESTUDIOS CRIMINOLÓGICOS Y PENITENCIARIOS (November 2002), at 120. The second study found that prosecutors requested pre-trial detention in approximately one-third of all cases in which a suspect had been identified, and that about 15 percent of all accused are actually placed in pre-trial detention. Baytelman & Duce, *supra* note 44, at 190–191. Judges granted orders of detention in 90 percent of the applications, although this rate varied from a low of 41 percent to 100 percent. See Anuario Estadístico 2004, available at [www.ministeriopublico.cl](http://www.ministeriopublico.cl).

62 See Vera Institute of Justice, *Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector* (2003), available at [http://www.vera.org/publication\\_pdf/207\\_404.pdf](http://www.vera.org/publication_pdf/207_404.pdf).

63 The legislature created the *Ministerio Público* by constitutional law (Law on the *Ministerio Público*) on October 15, 1999. The Constitution now has a separate chapter for the *Ministerio Público* (6a),

but, as this report shows, has also limited its influence in the justice system overall, as well as its operational capacity to some degree.

The institutional isolation of the *Ministerio Público* was not part of the original constitutional design. In the first proposal presented to the legislature, the *Ministerio Público* was to be a part of the judiciary, as it is in Columbia and Paraguay, for example. But there was substantial concern that the influence of the judiciary might itself compromise the autonomy of the prosecution service.<sup>64</sup> One example of this influence is that, both in the original plan and in reality, the Supreme Court today produces a list of the candidates from which the President nominates the *Fiscal Nacional*. Another contaminant that reformers wanted to avoid was the bureaucratic administration of the courts, widely perceived as lethargic and inflexible institutions. Yet there was equal concern that the administration of the laws would be too vulnerable to political direction if the Chief Prosecutor were to report to and receive instructions from the Minister of Justice. The resolution of these concerns was to insulate the prosecution service from the powers of both the Supreme Court and the Ministry of Justice.

## 4.2. Relationship with the legislature

The constitutional provisions regarding the *Ministerio Público* largely insulate it from interference by the legislature. Only the upper house, the Senate, has any direct influence, through its power to approve or reject the President's nomination of the *Fiscal Nacional*, and even this influence is only momentary. The *Fiscal* is appointed for a non-renewable period of eight years,<sup>65</sup> and during his tenure is not otherwise directly accountable.

The lower house, the Congress of Deputies, has some indirect statutory authority over the *Ministerio Público* in four ways: legislation; the budget; solicitation of information about current practices; and the initiation of impeachment proceedings against its National or Regional Directors.

*Legislation:* There are only a few examples of the legislature introducing new laws that limit or circumvent the authority and discretion of prosecutors or judges. One early proposal, for example, which surfaced in 2004, would have eliminated the requirement that prosecutors obtain prior authorization from the owner of a house or the “control judge” (*juez de garantía*) to search houses when in pursuit of a suspect.<sup>66</sup> More recently, concerns about what some scholars called “automatism” in the application of the law on pretrial detention caused the legislature to consider a controversial draft bill, originally submitted by the government, that would simplify and

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shoe-horned in between the Judiciary (chapter 6) and the Constitutional Court (chapter 7).

64 See Mauricio Duce, *¿Qué significa un Ministerio Público Autónomo?: Problemas y perspectivas en el caso chileno*, IX APUNTES DE DERECHO 10 (2001), at 9.

65 The original term of appointment was 10 years. See Law on the Ministerio Público, Art. 16. A revision of this law in November 2005 reduced the term to 8 years.

66 See the description of draft laws recommended by the Commission of Experts established by the legislature in November 2003 in *Documento de la Comisión nombrada para revisar y evaluar la marcha y funcionamiento del nuevo sistema de enjuiciamiento criminal* (2003), available at <http://www.cejamerica.org/doc/documentos/cl-expertos-rpp.pdf> [hereinafter *Documento*].

expedite searches and seizures and obviate judicial control of law enforcement.

*Budget:* Every year, the *Ministerio Público* receives a “preliminary framework” budget from the Treasury, or *Ministerio Hacienda*, from which it develops a more specific request and justification for planned expenditures. The *Fiscal Nacional* and his executive director then negotiate directly with the Treasury before submitting a proposal to the legislature, which may make changes to the budget before it is introduced into law. According to the Deputy Director of the Budget Department in the *Ministerio Público*, for none of the past five years has the total sum been reduced from previous years, even though within the budget, some items were cut because certain expenditures were not made.<sup>67</sup>

*Impeachment:* The legislature can initiate impeachment proceedings against senior prosecutors. Upon a motion of ten of its 120 members, the Chamber of Deputies (lower house of the Congress) can request the Supreme Court to consider removing the National or Regional Directors of the prosecution service for “incompetence, bad behavior, or negligence.”<sup>68</sup> The Court must convene specially for such a proceeding, and may order a removal by a vote of 12 of its 21 judges. This arrangement appears to be an adequate remedy against gross injustice or manifestly arbitrary behavior on the part of prosecutors, but it has limited ability to prospectively influence the work of the *Fiscal Nacional*. First, the range of offenses for which such a proceeding is authorized is short but broad and general, and their meaning is not explained in greater detail in jurisprudence. Second, the members of the Court themselves create the original list of candidates from which the President makes a nomination, and thus may already have approved the particular prosecutor whose proposed removal is before them. The impeachment provision, in short, is not an intimidating check on the power of the prosecutor.

*Soliciting Information:* The *Ministerio Público* is not required to submit an annual report to the legislature. Instead, it produces an annual report (*cuenta pública*) for the general public. The report must include “relevant statistics” and information on expenditures, but there is no other Congressional guidance as to its contents.<sup>69</sup> The legislature can also solicit information about the *Ministerio Público*’s work; state agencies such as the *Ministerio Público* are obliged to respond to such requests, and Congress can also establish special investigative commissions for this purpose.<sup>70</sup> However, the legislature has apparently never used this authority, and it is not clear what type of information the legislature can subpoena: whether, for example, it can obtain records of directions given by prosecutors to investigators or investigation notes.<sup>71</sup>

67 Interview with Paulina Salineras, Deputy Director of the Budget Department of the *Ministerio Público*, November 30, 2005.

68 *Constituciones Políticas de Chile* [Political Constitution of Chile] [hereinafter *Constitution of the Republic of Chile*], Art. 80.

69 *Law on the Ministerio Público*, Art. 21.

70 *Ley Orgánica Constitucional del Congreso Nacional* [Constitutional Law on the National Congress], no.18.918, Sec. 1, Art. 9; *Reglamento Cámara de Diputados* [Rules on the Chamber of Deputies] [hereinafter *Rules of the Chamber of Deputies*], Sec. 3, Art. 293, 299.

71 *Rules of the Chamber of Deputies*, Sec. 3, Art. 293, 299.

The legislature may also influence the *Ministerio Público* indirectly, such as by shaping public opinion. For example, in October 2003, the President of the Senate's Commission on the Constitution, Legislation, and Justice suggested that the reform was not adequately "responding to the expectations it created."<sup>72</sup> Statements such as these, associated with public insecurity and fear of crime, can trigger substantial political reaction. In this case, the comments coincided with the creation of a public commission to review the reforms, which, among other things, chastised the *Ministerio Público* for an absence of "leadership."<sup>73</sup> While this complaint did not result in any specific action, it may have had a general effect: the prosecution service has more recently tried to articulate a role for itself in discussions of public safety.<sup>74</sup>

### 4.3. Relationship with the executive

The executive has very little direct authority over the *Ministerio Público*. The President nominates the *Fiscal Nacional* from a list of five candidates prepared by the Supreme Court.<sup>75</sup> However, the President does not have any continuing authority over the *Fiscal*, and has few formal or public means by which to convey his views to the prosecution service.

There is a National Commission for the Coordination of the Reform, in which representatives from all legal institutions participate and which the President has chaired on one occasion. But the President cannot instruct the *Fiscal Nacional*, and since the Commission's meetings are public, the forum is a venue for resolving institutional disputes. The Commission is neither designed nor used to shape binding policy, and any guidance that emerges from meetings at this forum is political and persuasive.

A more regular forum for communicating the interests of the executive is the Coordinating Committee (*unidad coordinadora*) for the Reform located within the Ministry of Justice. The *Fiscal Nacional* is, *ex officio*, a member of this Committee and the *Ministerio Público* is regularly invited to deliver reports and share information. But the *Fiscal* is under no legal obligation to attend these meetings, and no repercussions result if the *Ministerio* does not share information. The *Ministerio* has at times been reluctant to share information with the Committee; it took several years for a statistical annex (*anuario*) to be produced,<sup>76</sup> and reportedly, it was easier to obtain data from the police than from the *Ministerio*.

The *Ministerio Público* in turn has only limited formal authority over executive agencies. All government agencies are obliged to provide information solicited by the *Minis-*

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<sup>72</sup> Diez juristas integran comisión de la reforma, EL MERCURIO, Oct. 23, 2003, at 1.

<sup>73</sup> The report considered the *Ministerio Público* to have confused the concepts of independence and passivity and urged it to play a "decisive and protagonistic" (*protagónico y decidido*) role in the future. See *Documento*, *supra* note 66, at 18, 60.

<sup>74</sup> In November 2004, the *Ministerio Público* created an internal commission for the elaboration of public policies in the sphere of public safety.

<sup>75</sup> Constitution of the Republic of Chile, Art. 32; Law on the *Ministerio Público*, Art. 1.

<sup>76</sup> The compendium is available on the website of Paz Ciudadana at [www.pazciudadana.cl](http://www.pazciudadana.cl).

terio “without delay.”<sup>77</sup> If an agency deems the documents secret, and thus not subject to subpoena, a senior prosecutor can ask the Court of Appeals to resolve the dispute. If the government argues that release or publication of the information might compromise national security, the Supreme Court may intervene and settle the dispute. Without a constitutional crisis or other test of the relationships between judiciary, prosecution, and executive, it is difficult to measure the extent of this authority in practice.

#### 4.4. Relationship with the police

There are two main policing institutions in Chile, the Military Police (*Carabineros*) and the Civil Police (*Policía Civil* or *Investigaciones*). The *Carabineros* are part of the Ministry of Defense, but report to the Ministry of the Interior on matters of public safety<sup>78</sup> and, with the exception of crimes and offenses observed directly by police officers, must be authorized by the prosecution service prior to conducting investigations. The Civil Police are responsible for conducting investigations into major criminal cases and are directed in this capacity by the *Ministerio Público*. The Civil Police can also be directed by the *Ministerio Público* to collect additional information in cases of lesser crimes, such as public order offenses, on which the *Ministerio Público* proceeds to trial. The *Ministerio Público* has no authority over the appointment, training, and professional advancement of police officers or investigators. These agencies largely operate independently from one another.

Still, prosecutors have substantial powers in the investigation of cases and thus over the conduct of the police in individual cases. The police are formally an “auxiliary” to the *Ministerio Público*, and police investigators must comply with all instructions and guidance given by prosecutors.<sup>79</sup> Furthermore, the police are required to forward all reports of crime to the *Ministerio*;<sup>80</sup> this usually takes place within 24 hours, and there is little reason to believe that cases are not reported.<sup>81</sup> Prosecutors can also initiate cases directly upon receipt of a victim complaint, and they can “directly exercise the functions of investigation” in some cases, interviewing witnesses, seizing documents, and securing information. In practice, however, most investigative work is completed by the time a prosecutor is apprised of a case, as the police are obliged to undertake swift action upon receipt of a complaint of a crime. In cases with few leads, prosecutors merely formalize the absence of evidence or the possibility of proceeding further in an administrative decision to suspend work on the case, or archive it provisionally.

Other organs of the state also have investigative powers. The Internal Revenue Service has both investigative and quasi-judicial authority in certain areas. In cases of administrative infractions (*faltas*), the IRS works inquisitorially, much as an administrative agency, first investigating and then adjudicating its own findings, and, where

<sup>77</sup> Code of Criminal Procedure, Art. 19.

<sup>78</sup> A proposed constitutional amendment would place the *Carabineros* directly under the Ministry of the Interior. See *Diez juristas integran comisión de la reforma*, EL MERCURIO, Oct. 23, 2003, at 1.

<sup>79</sup> Code of Criminal Procedure, Art. 79.

<sup>80</sup> Code of Criminal Procedure, Art. 84.

<sup>81</sup> Interviews with prosecutors in Antofagasta and Temuco, Chile (May 2003).

expedient, applying monetary penalties. In cases involving allegations of tax crime, where the applicable sanction might involve a period of deprivation of liberty, the director of the service must first file a complaint (*denuncia* or *querella*) with the police; the agency then exercises the “rights and roles” that the Code of Criminal Procedure assigns to a victim. In deciding whether or not to proceed with a criminal complaint, the service has the power to search and seize accounting books and related documents of juridical entities. Such invasive measures can be appealed to a court, but only if a prior decision has been made that the offense under investigation is a crime.<sup>82</sup>

#### 4.5. Relationship with the judiciary

The *Ministerio Público* and the judiciary are completely separate. Each has its own budget and administrative apparatus, and prosecutors and judges have separate career paths and distinct professional cultures. Nevertheless, the judiciary has considerable power to shape the *Ministerio* and the conduct of prosecutions, and the relationship between the judiciary and the *Ministerio Público* is at times strained.<sup>83</sup>

The Supreme Court plays an important role in selecting the *Fiscal Nacional*. The Court supervises the open public competition for the *Fiscal* and produces a list of five finalists on the basis of an examination process it alone controls.<sup>84</sup> Judges also routinely chastise prosecutors in court for shortcomings in their work, and sometimes they ignore the sentencing recommendations offered by prosecutors in summary proceedings, where defendants have acknowledged guilt, presumably upon the promise of a particular punishment.<sup>85</sup>

Senior judges and prosecutors enjoy slightly different security of tenure. Whereas judges serve indefinitely upon good behavior, both the *Fiscal Nacional* and the *Fiscales Regionales* serve ten-year non-renewable terms, and must retire at age 75. Also, unlike judges, prosecutors’ work is reviewed annually by their superiors. Compensation levels are, however, virtually identical: The *Fiscal Nacional* receives the same remuneration as the President of the Supreme Court, and all other prosecutors’ salaries are equivalent to those of judges at the same level of administrative hierarchy and service grade.

There is no formal prohibition against prosecutors becoming judges or vice versa, but a candidate for a judgeship must first complete a semester of study in the judicial academy, a requirement that discourages most prosecutors from such a transfer.<sup>86</sup>

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82 See *Código Tributario* [Tax Code], Art. 161(10).

83 A former President of the Supreme Court has criticized the *Ministerio* for combining too many powers within one agency, noting that “there are no analogues anywhere in the world.” See *Presidente de la Corte Suprema reitera críticas a Fiscalía Nacional*, LA SEGUNDA, July 26, 2002. This may have been as much a personal and institutional as a constitutional critique: before 2000, the Supreme Court was first without equals, and its pre-eminent position has been marginally reduced by the strengthening of an autonomous prosecution service.

84 As noted, the President then selects the *Fiscal*, and the Senate approves the candidate.

85 Interview with Francesco Ljubicic, then Chief Prosecutor of the City of Villarica, currently Chief Prosecutor for the 9<sup>th</sup> Region (Mar. 2003).

86 There have been several instances of judges being appointed *Fiscales Regionales*, but apparently no



There are also informal barriers to such transfers: At lower levels of the justice system, prosecutors and judges have professional but rarely cordial relationships; most judges are much older than line prosecutors, and there appear to be very different cultures in these two institutions. The prestige of the new prosecution service has yet to equal the cultural authority of the judge.

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## V. Publicizing the Prosecution Service's Activities

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At the national level, public relations—shaping and responding to public expectations—is perhaps the weakest aspect of the *Ministerio Público*. It is nearly impossible to gauge the public's perception of the work of the *Ministerio Público*. There are no national studies of people's attitudes toward the reform or the *Ministerio* in particular.<sup>87</sup> There are also no studies of the public's expectations of the reforms;<sup>88</sup> evaluation of the reforms remains the province of experts, whose criteria of evaluation may not coincide with the concerns and interests of the general public.<sup>89</sup>

The reputation of the *Ministerio Público* among many legal professionals today is as a capable but isolated institution: skilled, technocratic, and aloof. This reputation may be a reflection of the personality and politics of the current *Fiscal Nacional*, Guillermo Piedrabuena Richard, as much as a consequence of constitutional design: Piedrabuena Richard is described by people who know and work with him as a person who does not like public attention or criticism.<sup>90</sup>

Internal reviews of the work of subdivisions of the *Ministerio Público*—such as the unit for assisting victims and witnesses—have generally found high levels of satisfaction, but these studies have not probed the reasons that victims are satisfied.<sup>91</sup> For example, they have not discovered whether victim satisfaction is linked to the treatment they received or how the offender was punished. Also, these studies did not investigate the extent to which positive victim experiences are reported to others and what effect, if any, they have on perceptions of public safety and justice among

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instances of prosecutors joining the judiciary.

87 The legislature's blue ribbon commission reported findings only on public knowledge of the existence of the reforms and whether or not the public "agrees" with them. See *Documento*, *supra* note 66.

88 On popular perceptions of justice before the reforms, see Luis Barros Lezaeta, *Opiniones y experiencias de los sectores populares urbanos en torno a la justicia* (1997).

89 Most studies by local researchers as well as international observers have judged the reforms in positive terms. See Baytelman & Duce, *supra* note 44, at 233, 243; *Documento*, *supra* note 66, at 10. See also Cristián Riego, *Informe comparativo: Proyecto seguimiento de los procesos de reforma judicial en América Latina* (Oct. 2004), available at [www.cejamericas.org/proyectos/inf\\_comp.pdf](http://www.cejamericas.org/proyectos/inf_comp.pdf); Andres Ritter & Detlev Achhammer, *Evaluación de la Reforma Procesal Penal Chilena: Desde la perspectiva del sistema Alemán* (2003) (study financed by the German Society for Technical Cooperation).

90 See Duce, *supra* note 64.

91 The author had an opportunity to study these unpublished reports by the Division of Research and Division of Attention to Victims during his visits to the *Ministerio Público*.



citizens more broadly.<sup>92</sup> Just as some prosecution services conceive of the task of delivering justice in narrow terms of detection and incapacitation, the notion of the “public” served by the *Ministerio Público* has remained quite limited.

In the first years of the reform, the *Ministerio* had only a spokesman, who conceived of the role as projecting the voice and views of the *Fiscal Nacional* rather than absorbing public concerns and relaying them to the service. The spokesman was often put in awkward positions, since the press had critical questions, especially upon discovery of acquittals in cases of homicides.<sup>93</sup>

The *Ministerio Público* now has a national Department of Communications. Together with the library and Office of Documentation, it issues a quarterly with new jurisprudence—certain decisions by lower and higher courts are published in full—along with essays by senior staff of the *Ministerio* and results of studies completed by the Division of Research.<sup>94</sup> It also issues other periodic publications, as well as educational brochures and videos on how the new system of justice operates, and handles most requests from the media for information. However, the Department remains a primarily reactive organization,<sup>95</sup> and the position of Director of Communications has changed hands several times.

The *Ministerio Público* is obliged to deliver an annual report (*cuenta pública*) to the general public each April.<sup>96</sup> To date, there have been three annual reports, the most recent released in April 2004. Read out loud in person by the *Fiscal Nacional*, the report is a long narrative account of legal developments: it contains few meaningful statistical indicators concerning practices or the outcomes of its work,<sup>97</sup> although it is supposed to include “relevant statistics” and information on expenditures.<sup>98</sup>

At the regional and local levels, by contrast, innovative practices have been adopted in communications and public relations. Many of the Regional Directors of Prosecution have used one of their two allotted advisor positions to create a press officer and mobile public relations office. Some city level prosecutors have taken further steps, without additional resources, to communicate to the public the significance of the work of the *Ministerio*. For example, the Chief Assistant Prosecutor in the city of Antofagasta issues regular bulletins to community organizations about crime patterns; sometimes, as the author had an opportunity to observe personally during a visit to this prosecutor’s office, the information is based on analysis of cases the *Ministerio* dismissed without charges, a fact that many prosecutors prefer not to discuss.

92 See Ministerio Público, *Percepción y satisfacción de los usuarios de las unidades regionales de atención de víctimas y testigos, sobre la atención entregada en la IV y IX regiones* (Sept. 2002) (unpublished study); Ministerio Público, *Percepción y opinión de víctimas sobre la atención y protección brindada por el Ministerio Público* (Dec. 2002) (unpublished study by SUR, a non-governmental research organization).

93 See Duce, *supra* note 64.

94 See Anuario Estadístico 2004, available at [www.ministeriopublico.cl](http://www.ministeriopublico.cl).

95 Interview with first director of Department of Communications at the *Ministerio Público*.

96 Law on the *Ministerio Público*, Art. 21.

97 See, e.g., *Anuario Estadístico del Ministerio Público 2005*, available at [www.ministeriopublico.cl](http://www.ministeriopublico.cl).

98 Law on the *Ministerio Público*, Art. 21.

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## VI. Statistics and Appendices

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An abundance of quantitative information about the reformed system of justice is available to the researcher. The Research Division of the *Ministerio Público* produces quarterly unpublished reviews containing basic information about the administration of justice. These bulletins record the numbers of cases that enter and leave the system in a particular time frame, the types of cases and character of reported offenses (homicide, robbery, rape, etc.), and the proportion of cases that have been dealt with. Substantial attention is paid in these reports also to the type of disposition—for example, what proportion of cases was dismissed or provisionally archived, was resolved upon a decision of a judicial body, or culminated in a trial. These bulletins also report the incidence of the use of restrictive measures prior to adjudication, the number of preventive detentions ordered, and the number of oral trials and their outcomes. Much of this information is reported by region, which, deliberately or not, invites comparisons and some competition between Regional Directors of Prosecution.

The Ministry of Justice also produces an annual compendium (*anuario*) of justice statistics,<sup>99</sup> which collates data gathered and reported by the various justice agencies (police, prisons, prosecution, and other auxiliary services). However, like the bulletins published by the *Ministerio Público*, the compendium is not designed to address the quality of justice, and it does not measure data against norms or benchmarks; it is not designed or used as a tool of assessment and accountability, and it is therefore difficult to draw conclusions from this data about the qualitative performance of the justice system.

### *Crime, Victimization, and Public Safety*

Crime is an important public concern in Chile. Public opinion polls regularly record anxiety about crime as one the top three civic concerns, usually just behind health and education. There is an abundance of data on levels of crime, victimization, and fear of crime, and most data show a steady rise in the level of reported crime; the ability to respond to crime has become a central issue in discussions of the reforms. Ministry of the Interior data shows a rapid rise in the rate of reported crime and also in the incidence of arrests.<sup>100</sup> Between 1997 and 2002, the number of reported “index” crimes increased by 77 percent, and the number of arrests for such offenses increased by 108 percent, as Table 1 illustrates.

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<sup>99</sup> The compendium series, *Anuario de estadísticas criminales*, is available at [www.pazciudadana.cl](http://www.pazciudadana.cl).

<sup>100</sup> The data is published on the Ministry’s website, at [www.seguridadciudadana.gob.cl](http://www.seguridadciudadana.gob.cl).

**Table 1.** Reported Index Crimes (*denuncias*) and Arrests (*detenciones*)<sup>101</sup>

	Reported index offenses and arrests, in thousands and year-on-year percentage change, 3 <sup>rd</sup> quarter totals, 1997-2002											
	1997		1998		1999		2000		2001		2002	
	#	#	% Δ	#	% Δ	#	% Δ	#	% Δ	#	% Δ	
Offenses	44.1	43.8	-0.1	50.2	14.6	57.9	15.2	67.0	15.8	78.0	16.4	
Arrests	17.3	16.8	-0.3	23.7	40.9	27.0	14.3	31.9	18.3	36.1	12.8	

Source: Division of Public Safety, Ministry of the Interior, Chile, [www.seguridadciudadana.gob.cl](http://www.seguridadciudadana.gob.cl)

Note: Numbers in thousands rounded to nearest tenth

Levels of reported crime are not the same as levels of victimization; for example, 61.8 percent of persons victimized in Chile in 2002 did not report the incident to the police.<sup>102</sup> Fear of crime appears to be growing as well. Such indicators are of course volatile and are shaped by many forces, including the media; nevertheless, these and other studies suggest that there has been some increase in criminal conduct in Chile, and this plays an important role in shaping the public debate on justice reform.

**Table 2.** Administrative Resolutions as Share of all Dispositions, 2001-2002

	2001		2002	
	# cases	%	# cases	%
All Dispositions	66,638	100.0	147,991	100.0
Conditional dismissal	19,847	29.8	70,857	47.9
Expediency principle	22,738	34.1	26,922	18.2
Decision not to investigate	4,573	6.9	18,167	12.3
Total administrative resolutions	47,158	70.8	115,946	78.4

Source: Ministerio Público, *Análisis de la información entregada en el compendio de información estadística* (Dec. 2000); *Archivo Provisional y Principio de Oportunidad: análisis de los datos estadísticos* (2002) (unpublished report).

101 Index crimes, or “crimes of major social significance” (*delitos de mayor connotación social*), include homicide, rape, assault, robbery, burglary, and theft, but not motor vehicle theft.

102 See *Interview with Gonzalo García*, *POLICIA Y SOCIEDAD: DEMOCRATICA*, Mar. 2002, no.10, at 21 (at the time of the interview, Gonzalo García was director of the Division of Public Safety at the Ministry of the Interior).

*Productivity:*<sup>103</sup> Prosecutors speedily resolve most of the major criminal cases brought to them. Nearly half of all cases were resolved within two months, nearly two-thirds (61 percent) were concluded within three months, and more than four-fifths (81 percent) were disposed of within six months of their reception. Only a very small proportion of cases drag out for more than a year.

**Table 3.** Disposition Rates, by Month and Region, 2002

Month of Disposition	Number of Cases Disposed of by Region					ALL REGIONS
	2	3	4	7	9	
1	934	409	509	960	1190	4,002 (28.2%)
2	492	409	517	711	931	7,062 (49.7%)
3	160	141	453	489	402	8,707 (61.3%)
4	110	105	275	307	391	9,895 (69.6%)
5	76	74	245	168	266	10,724 (75.5%)
6	48	51	187	184	330	11,524 (81.1%)
7	36	83	215	144	128	12,130 (85.4%)
8	27	30	113	60	80	12,440 (87.6%)
9	14	20	75	71	57	12,677 (89.2%)
10	15	31	114	63	107	13,007 (91.6%)
11	9	17	72	35	105	13,245 (93.3%)
12	5	7	17	11	41	13,326 (96.0%)
<b>Total Disposed</b>	1926	1377	2792	3203	4028	13,326 (93.8%)
<b>Total Registered</b>	1,984	1,448	3,080	3,358	4,334	14,204 (100%)

Source: Division of Research, Fiscalía Nacional, Chile

These data also show that there is no plateau in productivity; the percent of cases completed rises continuously over time. This suggests that prosecutors efficiently sort cases, conducting an initial assessment and completing simple cases as swiftly as possible. It also suggests that they deploy resources wisely: there is no backsliding or excessive delay in the disposition of more difficult cases.

<sup>103</sup> In order to assess the productivity of the *Ministerio Público*, the author requested data on the time periods and rates at which some disposition was reached for the more than 14,000 felonies reported to prosecution offices in the five regions active in the reform in the month of January 2002. The purpose was to determine what proportion of victims waits more than twelve months for the state to produce an authoritative decision in their case, and whether there was a plateau in productivity—a time period after which prosecutors cease to dispose of cases quickly. The data was generated by SAF (*systema al apoyo a las fiscales*), the *Ministerio Público*'s case-management system, in a special unpublished internal report, *Delitos ingresados en enero 2002*.

**Table 4.** Cases Received and Closed, 2001-2002

Region	# Cases Received ( <i>recepcionados</i> ) / # Cases Closed ( <i>terminados</i> ), by Quarter							
	2001				2002			
	1 <sup>st</sup>	2 <sup>nd</sup>	3 <sup>rd</sup>	4 <sup>th</sup>	1 <sup>st</sup>	2 <sup>nd</sup>	3 <sup>rd</sup>	4 <sup>th</sup>
II	*	*	*	58.3%	93%	94%	93%	102%
III	*	*	*	44.3%	82%	80%	102%	114%
IV	33.5%	54.2%	59.7%	79.1%	89%	97%	135%	127%
VII	*	*	*	48.3%	71%	89%	89%	116%
IX	46.9%	66.1%	84.1%	91.9%	93%	119%	93%	127%
<b>ALL</b>	<b>41.4%</b>	<b>62.5%</b>	<b>76.2%</b>	<b>73.0%</b>	<b>85.7%</b>	<b>99.2%</b>	<b>100.6%</b>	<b>118.2%</b>

Source: Division of Research, Fiscalía Nacional, Chile

Note: Reforms were not introduced in the 2<sup>nd</sup>, 3<sup>rd</sup>, and 7<sup>th</sup> Regions until December 2001.

It also appears that the prosecution service has become more productive over time. Most offices are coping well with the sizeable caseload; in some periods in some regions, the number of closed cases actually exceeds the number of new cases entering the system. More impressive still is the amount of time that elapsed between the onset of the reform and the ability of a regional prosecution service to master its caseload. In the 9<sup>th</sup> Region, for example, prosecutors closed more cases than were accepted in the second trimester of 2002. In the 3<sup>rd</sup> Region, this was achieved earlier, after less than 12 months of operations, suggesting that new prosecutors are learning from their peers and colleagues in other regions.

These are not the only inferences or criteria available for judging productivity. One can also examine different attributes of the system as a whole in terms of productivity. One might, for example, examine the speed with which prosecutors close complex cases, and also consider regional variation.<sup>104</sup> A sound and balanced justice system would presumably work well in all jurisdictions and on all types of offenses.

*Effectiveness:* The degree to which prosecutors achieve convictions in the cases they are brought serves as a sign of their “effectiveness.” Early indications suggest that the reformed system produces a higher rate of convictions over a 15-month period.<sup>105</sup> Seven percent of all cases forwarded to prosecutors in reformed areas in these months culminated in a conviction, compared to less than two percent of all cases reported to a court in the unreformed system in the same period. This difference in the

<sup>104</sup> As internal prosecutor’s offices’ reports analyzed for this study show, in some regions it takes less than two weeks to dispose of half the cases of reported robbery. In the first five regions that underwent reform, half of all robberies are closed within 45 days, and half of all homicides reported in January 2002 were closed within two months.

<sup>105</sup> See Marangunic & Foglesong, *Analizando la reforma a la justicia criminal en Chile*, *supra* note 9 (tracking 7,000 cases begun in January and February 2002, some under the old system and some under the new).

ability of the two systems to produce convictions is even greater in cases involving an arrest, where there is often more information upon which to build a solid case. The new system produces convictions in 42 percent of such cases, while the conviction rate for this category of cases in the old system is just seven percent.<sup>106</sup>

**Table 5.** Conviction Rates—Cases with an Arrest

	Old System			New System		
	Sample	Convicted	%	Sample	Convicted	%
Robbery (all kinds)*	81	13	16.0%	39	16	41%
Assault	11	0	0%	6	1	17.6%
Theft	82	1	1.2%	17	3	17.6%
Homicide	2	1	50%	4	3	75%
Drugs and Alcohol	10	0	0%	14	12	85.7%
Others	89	4	4.5%	26	10	38.5%
<b>TOTAL</b>	<b>275</b>	<b>19</b>	<b>6.9%</b>	<b>106</b>	<b>44</b>	<b>42.4%</b>

Source: Antonio Marangunic and Todd Foglesong, *Charting Justice Reform in Chile: A Comparison of the Old and New Systems of Criminal Procedure*, [www.vera.org](http://www.vera.org)

These findings complement others studies that have found torpor and ineffectiveness in the old system, and agility and speed in the new system.<sup>107</sup> However, prosecutors have also reported that the new case-management system is burdensome, and they are not sure what purpose it serves other than to facilitate scrutiny of their decisions by superiors.

*Assessing the quality of justice:* As noted, it is difficult to draw inferences about the quality of justice from these data. There is no consensus about the definition of “quality,” about what kinds of values are worth scrutiny, or about the various weight of professional and public opinion in measuring them.<sup>108</sup> The evaluation of the performance of prosecution services is at a primitive stage. The number and percentage of victims given integral assistance is recorded, but not why they were given such assistance, whether it was appropriate or appreciated, and what consequence, if any, it had for the goals of criminal justice.

<sup>106</sup> *Id.*

<sup>107</sup> For example, one study, using a host of tools in innovative field research (well-structured interviews with justice officials at all levels, direct participant observation, and quantitative analysis), found that there has been substantial progress in achieving “balance” in the administration of criminal law, and concluded, with some reservations, that the reforms could be categorized as successful (*exitoso*). Baytelman & Duce, *supra* note 44. Likewise, a commission charged by the legislature in 2003 to return an interim evaluation found that, despite shortcomings, the reforms overall have been “very successful,” although it concluded that additional research was necessary to determine why the new system was successful and whether or not it was also more cost-effective. See *Documento*, *supra* note 66.

<sup>108</sup> For an argument in favor of using public opinion as the main measure in such evaluations, see Jose Juan Toharia, *Evaluating System of Justice Through Public Opinion*, in *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW* (Erik Jensen & Thomas Heller eds., 2003).

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# Report on the Crown Prosecution Service of England and Wales

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Anton Girginov  
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## **I. General Issues**

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The Crown Prosecution Service of England and Wales (the CPS), which is the national prosecution service for this jurisdiction, was only established in 1986, and since then has undergone a period of transition and institutional consolidation; this process continues, in particular with regard to the division of labor with the police forces. Prior to October 1, 1986, prosecutions had largely been in the hands of the police. Although there were prosecuting lawyers, they either worked for the former office of the Director of Public Prosecutions (DPP), a small office dealing with a limited number of high level cases, or were employed by local government with the local chief constable as their client. The final decision on prosecution in the majority of cases was, therefore, made by the police, and prosecutors appeared in court as their advocates.

The reform of prosecuting originated in a report of the Royal Commission on Criminal Procedure, completed in 1981.<sup>1</sup> The report argued that the criminal justice system required serious reform, and that it was no longer desirable for the police to be in charge of both investigating offenses and prosecuting cases before the courts. The report recommended that the power to investigate and the decision to prosecute remain with the police; however, subsequent responsibility to maintain charges before the courts should be assigned to new, territorially organized public prosecution offices, which would follow common administrative standards. The government then created a national service headed by a Director of Public Prosecutions under the Attorney General (and therefore not under local authorities). This concept was enshrined in the Prosecution of Offences Act of 1985.

The inception of the CPS for the first time gave to prosecutors the decision whether or not to continue with a prosecution. The CPS suffered a good deal of bad publicity in its early days, much of it unjustified. The new service was brought in very quickly, and with inadequate human resources. For example, it was opened with 1,250 lawyers, despite a need, perceived at the time by existing local government prosecutors and subsequently confirmed by internal and external surveys of staff numbers, for over 2,000. Many members of the administrative staff were new and untrained. The service also faced stiff opposition from the police and the Bar. The police had previously possessed the power to prosecute, and they valued it highly. The Bar, with its tradition of appearing for both the prosecution and the defense, nurtured a dislike of the very concept of a public prosecutor. In London, in particular, the inadequacies of the embryonic service were magnified, and the CPS received withering press coverage, from which it has struggled to recover. In recent years, the image and standing of the CPS have improved considerably, and it is now generally seen as more professional and as a central player in the criminal justice system.

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<sup>1</sup> Royal Commission on Criminal Procedure: report (1981), Cmnd. 8092.

Interestingly, independence from government has not been an issue for the CPS or its prosecutors. Presumably because of its particular history, for the CPS the question of independence relates mainly to independence from the police, and this underlies many of the issues to be discussed in this paper. However, the relationship with government is almost inevitably complex in a jurisdiction without a single constitutional document.<sup>2</sup> The CPS is a relatively new institution, but even the post of Director of Public Prosecutions has existed only since the enactment of the Prosecution of Offences Act of 1879. The post of Attorney General, however, the government's chief lawyer and prosecutor, dates back to the Middle Ages.

The position of the Bar is also important. The Bar, lawyers who are specialist advocates, has an eight hundred year history and has traditionally enjoyed a monopoly of rights to appear (rights of audience) before the higher courts. Solicitors, the other part of the legal profession, who have traditionally focused on commercial, family, and property law, are an eighteenth century creation and had rights of audience in the lower courts. Until recently, CPS lawyers, Crown Prosecutors who may be barristers or solicitors, had no rights of audience above the magistrates' courts (courts of summary jurisdiction). Rights of audience in the Crown Court (the criminal court of first instance in which serious cases are heard before a jury), the Court of Appeal, and the House of Lords were limited to barristers and, to a lesser extent, defense solicitors. Until relatively recently, one third of the CPS' annual budget was being spent on briefing the private Bar to appear on behalf of the CPS in these higher courts.

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2 The British constitution is not monolithic; indeed, it may be said that there is none. Perhaps the most satisfactory view is that it exists in a series of Acts, structures, and other institutions.

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## II. Structure and Organization of the Crown Prosecution Service

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### 2.1. Internal structure

The CPS is organized into a headquarters and 42 areas that parallel the territorial jurisdiction of the police.<sup>3</sup> The CPS employs some 5,600 people, of which 2,500 are lawyers. The CPS is composed of:

- ▶ The Director of Public Prosecutions,
- ▶ six Headquarters Directors and other senior administrative officers with functional responsibilities,
- ▶ a Chief Executive, responsible for management,
- ▶ Chief Crown Prosecutors (chief prosecutors), who manage the territorial divisions,
- ▶ Crown Prosecutors (prosecutors),
- ▶ caseworkers (paralegals), and
- ▶ administrative staff.

The CPS is headed by the Director of Public Prosecutions. In 1998, the position of the Chief Executive was also created to allow the DPP to focus on very serious casework, policy development, and leadership of the CPS. The DPP and the Chief Executive are aided by six Headquarters Directors whose powers are organized on a functional basis: casework, policy, finance, human resources, and business information systems. The heads of the Communications Division and Internal Audit also have their specific remit of operation.

The CPS is managed by a Board, which assists the DPP and the Chief Executive; it provides strategic direction and monitors performance and resources. The Board is composed of the DPP, the Chief Executive, the six Headquarters Directors, ten of the 42 Chief Crown Prosecutors (CCPs) nominated in rotation by the DPP, the Head of the Communications Division, and the Head of the Equality and Diversity Division. The Chief Inspector of Her Majesty's CPS Inspectorate (HMCPSI) attends Board sessions but does not participate in decision-making.

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<sup>3</sup> Initially the CPS was organized into 31 territorial units (Areas), each headed by a Chief Crown Prosecutor, but a number of reorganizations have since been undertaken. Areas were reduced to 13 in 1993, in order to establish the CPS as a more centralized, national service. However, the CPS was criticized for becoming over-centralized and bureaucratic and missing the correct balance between the national character of the operation and a reasonable degree of local autonomy. See the critique by High Court Judge Sir Iain Glidewell, *The Review of the Crown Prosecution Service*, Cm 3960 (1998). In 1998 the number of areas was increased and made contiguous with the 42 police areas, and the CPS was decentralized by delegating more powers and responsibilities to local chief prosecutors.

The HMCPSI is independent of the CPS and reports to<sup>4</sup> the Attorney General, who appoints the Chief Inspector, who is in turn responsible for:

- ▶ inspecting CPS operations,
- ▶ reporting to the Attorney General at his request on issues of relevance to Service operations,
- ▶ submitting an annual report to the Attorney General concerning CPS operations. The Attorney General in turn submits this report to Parliament.

The Chief Inspector appoints the inspectors and other officers of the Inspectorate. Parliament allocates the Chief Inspector funds for the Inspectorate in a budget separate from that of the CPS.

Each of the 42 Areas is headed by a Chief Crown Prosecutor, assisted by an Area Business Manager. Relations between the areas and headquarters are established by a framework document, a standard template document that applies to all CPS Areas and which lists their delegated authority. This envisages considerable discretion for the Areas in making decisions for the discharge of their assignments.

Each CCP manages an Area's team of prosecutors and caseworkers and is responsible for running criminal prosecutions in the Area. The CCP is also required to ensure the participation of his Area in the improvement of criminal justice and the formulation of the strategy and goals of the CPS. These feed into the CPS resource accounts, which form the basis of the CPS' annual bid for funding. In addition, each CCP has a central role in the realization of government initiatives in the field of criminal justice. Each of the 42 local criminal justice areas of England and Wales has a Local Criminal Justice Board (LCJB), which is chaired by one of the local chief officers and is composed of the Chief Crown Prosecutor, Chief Probation Officer, Chief Constable of Police and Director of the Court Service. The LCJB is responsible for the overall efficiency of the criminal justice system in the locality. Each CCP publishes an annual report on operations for the fiscal year.

CPS Areas have been reorganized into units that deal with all the casework for the Area. Many of these units are co-located with the police, so that there is a reduction in administrative duplication and delay in putting files together and complying with court orders.

CCPs are appointed by the DPP, and they in turn appoint Crown Prosecutors and other staff. They are constrained in relation to numbers and grading by their budgets and grading guidelines. In any given area, there are between 12 and 300 Crown Prosecutors.

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<sup>4</sup> Crown Prosecution Service Inspectorate Act 2000 Section 1(3) re: budget.

The role of Crown Prosecutors is to:

- ▶ advise the police before charge;
- ▶ authorize charges in criminal cases (not including traffic and minor offenses);
- ▶ review cases in accordance with the *Code for Crown Prosecutors*;
- ▶ appear for the prosecution in magistrates courts;
- ▶ prepare cases for prosecution by the private Bar in the higher courts;
- ▶ increasingly, appear for the prosecution in the higher courts.

Each CCP appoints the caseworkers in his area. Ordinary caseworkers support Crown Prosecutors in preparing cases for court. Designated Caseworkers are appointed after their nomination by a special committee. Designated Caseworkers are not lawyers, but must have three years of service with the CPS, usually as ordinary caseworkers. Designated Caseworkers review limited types of case, mainly road traffic offenses, and present guilty plea cases in magistrates' courts.

*Performance management:* The CCP, assisted by his/her Area Business Manager and his/her Area Management Team, creates an Annual Business Plan setting performance targets, which include: improving timely disposition of cases; reducing the number of ineffective trials and unsuccessful outcomes; increasing confiscation orders concerning the proceeds of crime; and increasing the CPS' efficiency (that is, staying within budget).

Each Area carries out its own quarterly area performance review process, and the performance of each Area is monitored by CPS Headquarters in London. A meeting takes place each year between the management of each Area and Headquarters management. At these meetings, the performance of the Area is examined in detail and actions are agreed upon to improve performance within agreed time frames. Should an Area be seen to be underperforming, more frequent meetings will be arranged until matters can be brought back on course.

## **2.2. Budgetary process**

The CPS is allocated a three year settlement (budget) by the Treasury, following a round of negotiations between the Treasury and the Attorney General. The CPS must agree to performance measures as part of the budgetary settlement. The CPS then distributes the funds between the Areas and Headquarters Divisions, using an activity-based costing system, which applies a formula of apportioning funds according to the volume and complexity of work undertaken in the Area.

### 2.3. The status of the prosecutor general

The Director of Public Prosecutions is the head of the CPS. He is responsible for the management of the Service and, ultimately, for every casework decision. However, he is “superintended” by the Attorney General, who was historically the government’s chief prosecutor. Traditionally he appeared as counsel for the Crown in, for example, high profile murder cases, such as the “Yorkshire Ripper” case in 1981.<sup>5</sup> However, this practice has in the main lapsed. The current Attorney General does, however, appear for the government in human rights cases.

Parliament does not directly supervise the DPP’s operations. Rather, the DPP reports to the Attorney General,<sup>6</sup> who serves as an intermediary in their relations and is accountable for the CPS before Parliament. However, the Attorney General is not administratively or managerially responsible for the CPS. Each year, the DPP must submit a general report on CPS operations in the previous year to the Attorney General; the Attorney General presents a copy of the report to Parliament and publishes it.<sup>7</sup> The DPP must also submit reports on specific matters at the Attorney General’s request.<sup>8</sup> The DPP and the Attorney General have regular weekly meetings to discuss CPS performance and individual cases.

The DPP is appointed by the Attorney General and serves at his pleasure. An appointee must have at least 10 years of experience as a lawyer and may be either a barrister or a solicitor.<sup>9</sup> The DPP is, nowadays, generally appointed on a fixed term contract. The current DPP’s contract was originally for three years and has recently been extended for a further two years. His or her remuneration is fixed by the Attorney General, with the consent of the Treasury.<sup>10</sup> It is in theory the same salary as that of permanent secretaries in government departments. However, as DPPs are recruited by open competition, and the last three were appointed directly from the private Bar, the civil service has, to a certain extent, been obliged to pay a market rate.

The DPP is generally seen as an independent figure. In England and Wales, independence from political interference has not really been an issue for three quarters of a century. When prosecutors and others talk about the independence of the CPS, they invariably are referring to independence from the police. This was an issue which led to the establishment of the CPS and to the formal separation of investigation from prosecution. Although the Attorney General is a government minister, it is accepted that he/she acts independently as the government’s senior legal adviser. As with the Lord Chancellor, the Attorney General has a foot in many camps. He/she is a member of the executive, a member of the legislature, and head of one of the branches of the legal profession, as well as having overall responsibility for the prosecution

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5 R v Sutcliffe (1982) (unreported).

6 Prosecution of Offences Act 1985, Section 9.

7 Prosecution of Offences Act 1985, Section 9 (noting that the Director shall report as early as practicable after April 4 of each year).

8 Prosecution of Offences Act 1985, Section 9.

9 Prosecution of Offences Act 1985, Section 2.

10 Prosecution of Offences Act 1985, Section 2.



service—along with, at the moment, the Public Prosecution Service for Northern Ireland—and government civil lawyers. Under the United Kingdom's unwritten constitution, this situation is not considered to cause tensions or conflicts of interest. However, it is difficult to see any constitutional or legislative safeguards against misuse of the office by the individual or the government.

## **2.4. The status of individual prosecutors**

All prosecutors are recruited through open competition. Advertisements are published in national newspapers and professional journals and contain detailed information about job requirements and the competition procedure. Appointees must be lawyers, but may be either barristers or solicitors.<sup>11</sup> Crown Prosecutors (CPs) are usually employed on permanent appointments under civil service terms and conditions, with a retirement age of 60. Although all appointments of CPs are made in the name of the DPP, they are in practice made by the CCP for the Area in which the vacancy arises. CPs serve a two-year probationary period, after which—subject to satisfactory performance—they are designated Senior Crown Prosecutors (SCPs). In order to cover short-term shortages created, for example, by maternity leave, without exceeding manpower ceilings, the CPS also employs CPs on short-term temporary contracts.

The Director appoints CCPs. The majority of the CCPs belong, by virtue of their grade, to what is known as the Senior Civil Service. All such posts across government must be advertised within and outside the civil service.

Prosecutors, as civil servants, may be members of a trade union. Civil servants in the grades occupied by prosecutors may belong to one of two grade-based trade unions. In practice, almost everyone belonging to a union, or about 60%, are members of the First Division Association of Civil Servants (FDA). The FDA has considerable influence because of its position, representing as it does the most senior civil servants across all departments, and because of the Departmental Whitley Council System, which ensures active consultation between departments and the trade unions. The last General Secretary of the FDA is now a government minister, with a seat in the House of Lords. There is no national association of prosecutors, and the FDA is therefore the focus for staff regarding pay and conditions. It also represents prosecutors in disciplinary hearings and in any proceedings they may bring against the CPS.

The British civil service has a long tradition of formal staff appraisal, and the CPS has its own annual appraisal system. Each grade and function has a set of qualities and behaviors, covering legal and managerial ability, against which prosecutors are evaluated. Each individual prosecutor is also set personal targets by his/her line manager. Quarterly meetings are held between the manager and the prosecutor to discuss

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11 Prosecution of Offences Act 1985, Section 1(3). Traditionally, barristers have rights of audience in the higher courts; solicitors do not. All Crown Prosecutors enjoy the same rights of audience as solicitors, but may pass an internal CPS assessment in order to exercise rights of audience in the higher courts. This was opposed by the private Bar, but CPS prosecutors now play an active, though as yet minor, role in the higher courts.

progress and future targets, and at the end of the annual reporting cycle, a detailed report is written. This report is taken as the basis for development needs, promotion prospects, and performance pay. Each grade is assessed by a manager from the grade above, and reports are countersigned by the manager's manager. Such appraisals are, of course, crucial in considering suitability for promotion.

## 2.5. Individual accountability of prosecutors

The CPS has a hierarchical structure, and individual prosecutors do not normally prosecute a case, or refuse to prosecute a case, against the judgment of a superior. In principle, however, prosecutors exercise their own professional judgment in pursuing a given prosecution. Indeed, the Court of Appeals has indicated that dismissing a prosecutor because of a decision to prosecute, or not prosecute, a given case would constitute interference with prosecutorial independence (see below).<sup>12</sup> Day to day, all prosecutors make decisions on cases—whether to prosecute, to ask the police for more evidence, to stop proceedings, or to apply for pre-trial detention. The vast majority of these decisions will be made by an individual prosecutor. However, internal guidance seeks to ensure that certain decisions will be taken at an appropriately senior level. Generally, in such cases, the first prosecutor will make a preliminary decision and pass it up the line for confirmation. Some cases must be dealt with entirely by a more senior lawyer; some cases, for example serious fraud cases, are referred to Headquarters for prosecution by specialists. Managers control the distribution of cases to prosecutors and also dip check the decisions they make.

All prosecutors are civil servants. Since the early 1990s, the civil service has devolved its human resource functions to individual departments, and the CPS has consequently developed its own disciplinary code. The CPS Disciplinary Code requires a transparent system of discipline. If an alleged offense by a prosecutor is a minor infraction, the matter can be dealt with informally. The prosecutor will be spoken to by his/her line manager. No record is kept unless the prosecutor wishes it. The discussion is simply part of day to day management, and most prosecutors would not want a written report on their personnel record. If the matter is more serious, the allegation must be made in writing and a formal interview held, during which the prosecutor may be accompanied by a union official or a “friend,” who may be a colleague or someone from outside the Service.<sup>13</sup> The meeting may be chaired at a local level, but in very serious cases, the Head of Human Resources may chair the hearing. The prosecutor may call evidence in support of his case.

If the matter is sufficiently serious (and thus cannot be dealt with informally), the head of human resources, who is the official with the power to dismiss a member of staff, may indicate that the matter is one of gross misconduct, in which case the prosecutor may be dismissed for a first offense.<sup>14</sup> Offenses of gross misconduct include,

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12 R v Crown Prosecution Service ex p Hogg [1994] The Times, April 24, 1994.

13 Crown Prosecution Service Disciplinary Code, Section 56.

14 Crown Prosecution Service Disciplinary Code.

for example, the commission of a crime.<sup>15</sup> If the offense is not one involving gross misconduct, the prosecutor may not be dismissed for a first offense, but only for a succession of offenses.<sup>16</sup>

A prosecutor who is dismissed may appeal within the CPS and/or to the Civil Service Appeal Board, a civil service panel outside the CPS that hears appeals against dismissal by anyone who has been employed for at least a year. The department and the employee submit their cases in writing, and a hearing is addressed by both sides. The employee may be represented by a union official. In any event, a prosecutor who is dismissed may bring a case before an employment tribunal for unfair dismissal. This is a court that deals with unfair dismissal and cases of discrimination in employment. The Court of Appeal, in a case in which a dismissed member of staff unusually instituted proceedings for judicial review, has upheld the right of the CPS to dismiss prosecutors for disciplinary reasons,<sup>17</sup> although in *obiter dicta* the Court indicated that this would not extend to disciplinary actions that interfered with a prosecutor's decisional independence.<sup>18</sup>

## 2.6. Training

The CPS has a comprehensive training program to equip its prosecutors, administrative staff, and managers to undertake their duties. New lawyers are given an induction program tailored to their previous experience, conducted by experienced CPS lawyers known as lawyer tutors. Once on the job, lawyers have a range of courses available to help them specialize or start taking cases in the higher courts. Training is also available to cover changes in the law, usually as a result of new legislation. In such instances, the training may be mandatory for all prosecutors. Individual training needs are identified through the appraisal process.

All CPS vocational courses are certified as providing continuous professional development by both of the lawyers' professional organizations, the Bar and the Law Society (solicitors), the professional bodies that regulate the two branches of the legal profession, barristers and solicitors. Both specify a set number of hours of training that must be undertaken each year, and prosecutors are required to keep training logs to prove that they have completed the requisite number of hours. Training courses cover not only legal issues but also, as prosecutors progress, management skills. A separate training program, called Transform, trains managers to manage staff, budgeting, and performance. In addition, a range of computer training courses is available to all staff. The training is provided in a number of ways—through courses, distance learning packages, and, increasingly, through interactive means. The CPS has also introduced a virtual college, through which prosecutors can arrange and undertake distance learning online. The CPS is justifiably proud of its training. The

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15 Crown Prosecution Service Disciplinary Code.

16 Crown Prosecution Service Disciplinary Code.

17 *R v Crown Prosecution Service ex p Hogg* [1994] *The Times*, April 24, 1994.

18 *R v Crown Prosecution Service ex p Hogg* [1994] *The Times*, April 24, 1994.

main difficulty it encounters is availability of prosecutors to attend, given the pressure of work.

Designated Caseworker candidates are nominated for specialized training. They are trained by Crown Prosecutors to undertake simple and straightforward prosecutions in magistrates' courts. The training deals with the legal and evidentiary requirements of these cases, as well as providing practice in presenting cases to magistrates. Designated Caseworkers carry out their duties under the supervision of Crown Prosecutors. A caseworker must pass the selection exercise and successfully complete the training course before being formally designated.

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### III. Functions and Powers of Prosecutors

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#### 3.1. Prosecutorial functions in criminal justice

The CPS was established to prosecute all criminal cases investigated by the police (with the exception of some minor traffic offenses in which the defendant pleads guilty).<sup>19</sup> The role of the CPS is to prosecute offenders in criminal cases in a fair and effective manner, by:

- ▶ providing advice to the police about charges that may be brought;
- ▶ authorizing charges;
- ▶ reviewing cases presented by the police;
- ▶ preparing cases to be presented to the Magistrates' and Crown Courts;
- ▶ trying cases before the courts and providing instructions to private lawyers, where appropriate; and
- ▶ working with other governments to improve effectiveness in criminal justice.<sup>20</sup>

The CPS does not deal with criminal proceedings initiated by bodies other than the police. Charges filed by investigative bodies other than the police fall outside the scope of its competence, as do private prosecutions, at least initially. Once charges are filed, the CPS has the key role in all stages of the trial process through to final sentencing: maintenance of charges, strategy and presentation, and appeals. The CPS is not competent to monitor the enforcement of sentences.

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19 Prosecution of Offences Act Section 3(3) and Prosecution of Offences Act 1985 (Specified Proceedings) Order 1999.

20 See the CPS website, available at [www.cps.gov.uk](http://www.cps.gov.uk).

*Discretion to Initiate Prosecution:* The conduct of prosecutions is governed by the Code for Crown Prosecutors (hereinafter the Code), published by the Director and attached here at Annex A.<sup>21</sup> During the investigative phase, the CPS has only a consultative role. It may consult the police investigation on the prospects of prosecution, until the case is received from the police. Once the investigation is complete and the case is referred to the CPS, the reviewing prosecutor may decide to maintain the charges brought by the police, change them, or drop them altogether.

In deciding whether or not to prosecute, the prosecutor carries out two tests, the “evidentiary test” and the “public interest test.” If the case fails either test, it may not be pursued. The evidentiary test aims at establishing whether sufficient evidence has been collected to allow a realistic prospect that the magistrates or jury are more likely than not to convict. It involves considering the availability and reliability of evidence. Because of the adversarial nature of proceedings, prosecutors may only submit evidence of the culpability of the defendant, which means they must also consider what the position of the defense might be, what exonerating evidence it might have, and how the consistency of prosecution across the country might be affected. This last is important, as one of the reasons for establishing the CPS was to improve consistency in decision making.

The public interest test is a contextual assessment of the pros and cons of prosecution in a specific case. The Code contains an exemplary list of factors favoring or opposing prosecution. The public interest, which is the basis of the discretion exercised by the CPS, was defined in very general terms in the first edition of the Code in 1986, and caused some confusion among prosecutors, the police, and the public. Subsequent editions have sought to provide more detail.<sup>22</sup> As a general rule, the CPS pursues criminal proceedings unless there is a clear prevalence of factors against them. Because of the existence of the Code, the decision-making process is a reasonably transparent one. The public is able to see for itself the processes and criteria that the CPS uses in making decisions. While it might be said that use of the Code fetters the discretion of the CPS as a whole, as well as of individual prosecutors, their knowledge, skill, and experience are used in balancing the various factors. Use of the Code in fact adds to the CPS’ accountability, in that defendants can use it to argue that procedures have not been followed, and complainants can use it as the basis for judicial review of a decision not to prosecute.

Criminal proceedings may also be initiated by parties other than the police, except where the law reserves that right to the CPS—with DPP consent—or the Attorney General. When such a private prosecution has been initiated, the DPP may allow the private prosecutor to continue to conduct the case, itself take over the case and prosecute it, or take over the case and stop it.<sup>23</sup>

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21 Code for Crown Prosecutors, adopted on October 1, 1986, pursuant to the Prosecution of Offenses Act of 1985, Section 10 (requiring the Director to enact such a code) and revised four times since, most recently in 2004. The text of the Code may be accessed at the CPS website, [www.cps.gov.uk](http://www.cps.gov.uk).

22 Code for Crown Prosecutors, 2004 version.

23 Prosecution of Offenses Act 1985, Section 6.

Once a defendant has been charged by the police or a summons has been issued for his attendance at a magistrates' court, the Director may notify a defendant that criminal prosecution has been discontinued.<sup>24</sup>

*Control of Ongoing Prosecution:* In England and Wales, there are two courts of first instance, the magistrates' court and the Crown Court. All cases, no matter how serious, begin in the magistrates' court. Offenses are divided into three types according to seriousness—summary offenses, indictable offenses, and either way offenses. Summary offenses are the least serious, typically road traffic offenses and cases involving minor public disorder. These are dealt with exclusively in the magistrates' court, either by a bench of lay magistrates or by a District Judge, who are arbiters of both law and fact. Indictable offenses fall on the other end of the scale and include murder, rape, and robbery. They are tried in the Crown Court by a judge and jury—the judge is in charge of legal issues and the members of the jury are the determiners of issues of fact. The third category is known as either way offenses. These include theft, obtaining by deception, and burglary, and may be tried either at the magistrates' court or in the Crown Court. In a simple example, a charge of theft may relate to a simple taking of a small item from a shop. This would be suitable for trial at the magistrates' court. Conversely, the theft might be of many millions of pounds from a bank or of an extremely valuable item. Such a case would be heard at the Crown Court. The choice is initially up to the magistrates, who hear submissions as to venue from the prosecution and will inevitably send the more serious cases to the Crown Court. However, a defendant in an either way case has the right to be tried by a jury in the Crown Court and may elect this process. This can result in a number of less serious cases being heard in the higher court.

At any point before a case comes before a magistrates' court, the CPS may terminate criminal proceedings at its discretion. The CPS must notify the court, stating its reasons, and must also inform the defendant, but need not give the defendant any reasons for the termination.<sup>25</sup> The Director must also inform the defendant of his right to request that the proceedings continue (so as to ensure a full acquittal and clear his name).<sup>26</sup> Termination of criminal proceedings in this manner is not a barrier to new charges. This was a new procedure introduced by the 1985 Act and reflects the control of prosecutions that passed to the CPS on October 1, 1986.

Before the inception of the CPS, there were other ways in which a case could be terminated by the prosecution. These traditional ways are now also used by the CPS. Once a case has come before a magistrates' court, the CPS may drop proceedings as a result of lack of evidence or its own decision that there is no public interest in pursuing a prosecution. Proceedings may terminate in three ways and, depending on the specific option, may or may not be reopened subsequently:

1. *Disposal with notice:* The CPS may drop proceedings before a magistrates' court prior to the submission of evidence in summary proceedings or the transfer of

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<sup>24</sup> Prosecution of Offenses Act 1985, Section 23.

<sup>25</sup> Prosecution of Offenses Act 1985, Section 23.

<sup>26</sup> Prosecution of Offenses Act 1985, Section 23.

the case for trial by jury. If the case has been committed for trial by jury, the prosecutor may discontinue it at any time prior to submitting an indictment. In this situation, the defendant may request pursuance of criminal proceedings in order to secure an acquittal and clear his name. Otherwise, the CPS may reopen proceedings if significant new evidence is discovered. One of the purposes of the CPS is to provide clarity and certainty in the criminal justice process. It should not act arbitrarily; therefore, dropping a case indicates some finality. However, it is made clear to defendants in these circumstances that the CPS is entitled, in any event, to reinstitute proceedings, but will do so only if fresh evidence comes to light.

2. *Charges dropped in the course of proceedings:* The CPS may drop charges in the course of proceedings at the magistrates' court. Reopening of proceedings is possible; however, the defendant may not request pursuance of proceedings.
3. *Failure to submit evidence:* Once an indictment has been issued in the Crown Court, the CPS must petition the court to discontinue a case. However, the CPS may refuse to submit sufficient evidence, thus compelling the court to acquit.<sup>27</sup>

Recommendations have been made to reform the procedures for discontinuing proceedings. These include establishing a uniform procedure before all courts; allowing the CPS to discontinue proceedings prior to court proceedings without requiring the consent of the defendant or the court; allowing the CPS to reopen cases it has discontinued (with the court assessing whether or not reopening would constitute abuse of process); and allowing a defendant to request the court to acquit him on the basis of materials before it. These procedures generally do not require the prosecutor to give reasons for his/her decision to stop a prosecution. This could become controversial if repeated instances occurred in which prosecution was stopped in high profile cases. However, this has not been the case.

*The Role of Designated Caseworkers:* On October 1, 1998, legislation was introduced permitting Crown Prosecution Service staff who are not lawyers to review and present in magistrates' courts a limited range of cases involving straightforward guilty pleas. These may include shoplifting, possession of cannabis, and non-contentious traffic offenses. Under the supervision of experienced Crown Prosecutors, who assist and advise them, these Designated Caseworkers divide their time between police stations, where they review cases, and local magistrates' courts. Designated Caseworkers must pass a testing training course, validated by an external body, and be formally designated by the DPP before they undertake this work.<sup>28</sup>

Designated Caseworkers have limited independence in disposing of cases. They have some discretion to drop one of several related charges.<sup>29</sup> If a defendant pleads not guilty in court, a caseworker may decide to continue the prosecution, although he/she will not conduct the trial. Designated Caseworkers may also make minor adjust-

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<sup>27</sup> See *Blackstone's Criminal Practice* (Peter Murphy & Eric Stockdale eds., 2004), at D 39.

<sup>28</sup> Prosecution of Offences Act 1985, Section 7(a).

<sup>29</sup> In cases of traffic offenses, if charges have been filed on two or more separate counts, the caseworker may choose to pursue only one of these, dropping the other.



ments to cases.<sup>30</sup> For all significant changes, however, the CCP must consent to a Designated Caseworker request to terminate proceedings.

### 3.2. Relationship with the judge at the pre-trial stage

Crown Prosecutors are lawyers, members of the Bar, or Solicitors of the Supreme Court of Judicature. They are not, as in many civil law countries, members of the same cadre as the judiciary. As has already been noted, judges are chosen from among the senior ranks of the Bar and, to a lesser extent, solicitors. They act as referees between the prosecuting lawyer and the defense in criminal proceedings.

In England and Wales there is a tradition of lay involvement in the criminal justice system. This manifests itself in both the Crown Court (the court of first instance in which serious cases are heard), with the use of juries to determine guilt in contested cases, and in the magistrates' court (the court of first instance in which less serious cases are tried), by the use of lay magistrates, advised by a legally qualified clerk, who decide on both guilt and sentence. As mentioned above,<sup>31</sup> Crown Prosecutors appear in the magistrates' courts and, by and large, members of the private Bar appear on behalf of the CPS in the Crown Court and the appellate courts.

### 3.3. Powers outside the criminal justice system

The Crown Prosecution Service has no powers or duties outside the criminal justice system.

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30 For example, if during hearings it becomes apparent that a minor change in a summons is needed (the date, location, price, description of a vehicle, etc.), a caseworker may introduce such change without seeking assistance from the Chief Crown Prosecutor.

31 See Section I, above.

## **IV. Relationship of the public prosecution service to other organs of the state**

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### **4.1. The constitutional location of the Crown Prosecution Service**

England and Wales constitute part of Great Britain, which also includes Scotland and which, together with Northern Ireland, forms the United Kingdom of Great Britain and Northern Ireland. The United Kingdom is a parliamentary democracy with a monarch as a hereditary head of state. In practice, its government is formed by the majority party in Parliament and is generally accountable to it. Parliament is not subject to external control by any supreme or constitutional court or any other public body, except in relation to the European Union; its legislative acts and decisions by ministers and government officials can, however, be the subject of judicial review by the High Court.

England does not have separate legislative and executive branches, but rather is governed directly by the institutions of the United Kingdom.<sup>32</sup> Wales has its own Assembly with a more limited remit than the Scottish Parliament or the Northern Ireland Assembly. All parts of the United Kingdom share an English common law heritage, including an adversarial system of adjudication. England and Wales have their own joint system for the administration of justice, however. That system's structure and organization, including its public prosecution service, are different from the judicial systems of Scotland or Northern Ireland. The Crown Prosecution Service of England and Wales (CPS) was established in 1986.<sup>33</sup> The present institutional form of the prosecution service is therefore a relatively recent innovation.<sup>34</sup>

The CPS is the central agency responsible for public prosecution. However, it is not the only body with prosecutorial powers: a number of other state agencies and authorities at local level have powers to bring cases before the courts and to prosecute. Private individuals have traditionally had the right to initiate and present cases for prosecution in respect of any offense not requiring the specific consent of the Attorney General or the Director of Public Prosecutions.<sup>35</sup>

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<sup>32</sup> Wales has an assembly with limited powers.

<sup>33</sup> Prosecution of Offences Act 1985.

<sup>34</sup> Before 1986, the police forces were largely responsible for charging and prosecution, and although most employed lawyers as prosecutors, no single institution exercised prosecutorial supervision over their operations. *See* Section I, above.

<sup>35</sup> Prosecution of Offences Act, Section 6(1). *See* Section 4.5, below.

## 4.2. Relations with the legislature

The CPS has no direct relations with Parliament; rather, the Attorney General represents the CPS in Parliament and delivers its annual report to Parliament. Parliament may not conduct independent investigations into the activities of the CPS or individual prosecutors. However, Parliament scrutinizes the activity of all government departments, including the CPS. The head of the CPS and other senior members of staff are called before parliamentary committees, in particular the Public Accounts Committee, to discuss the effectiveness and efficiency of the CPS. Other than this, Parliament has no control over the CPS budget or the appointment of the DPP.

## 4.3. Relations with the executive

The CPS is a government department that, because it has no minister of its own, comes under the supervision of the Attorney General, who attends Cabinet meetings as the government's senior legal adviser. The Attorney General has a number of mostly administrative powers with respect to the CPS. He or she has regulatory authority over the CPS and limited powers to pass secondary legislation concerning the CPS.<sup>36</sup> However, this power has been exercised only once, to take some very minor offenses out of the hands of the CPS.

The Attorney General appoints the DPP and monitors his work.<sup>37</sup> The DPP must present to the Attorney General an annual report on the activities of the CPS, which the Attorney General publishes and presents to Parliament.<sup>38</sup> At the Attorney General's request and as part of his superintendence, the DPP also submits separate reports on specific matters.<sup>39</sup>

The Attorney General, with the consent of the Treasury, allocates the budget of the CPS, within the broader budget Parliament determines for the Attorney General, taking into account the CPS' objectives and expenditure.<sup>40</sup> Again with the consent of the Treasury, the Attorney General sets salary levels, contributions in relation to state benefits, and pension contributions for CPS personnel, although a number of these benefits are in fact part of the overall civil service package of benefits, and salaries are determined as part of the budget in negotiation with the trade unions.

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36 Prosecution of Offenses Act Section 3(3) and Prosecution of Offenses Act 1985 (Specified Proceedings) Order 1999.

37 Prosecution of Offenses Act, Section 2.

38 Prosecution of Offenses Act, Section 9.

39 Prosecution of Offenses Act, Section 3(1).

40 Prosecution of Offenses Act, Section 2.

The Attorney General has certain powers to stop prosecutions (*nolle prosequi*), and some offenses still require his consent (*fiat*) to prosecute,<sup>41</sup> but in general prosecutors are independent in making decisions relating to criminal proceedings.

Prosecutors' decisional independence is at least theoretically threatened by the political oversight of the service. In deciding whether or not to institute criminal proceedings, prosecutors are required to consider only the quality of the evidence and considerations of the "public interest."<sup>42</sup> Yet because the CPS is located within the executive and superintended by a political figure, the Attorney General, there is a risk that prosecutors could be subjected to political influence, either directly or through general policy guidance, or could otherwise take political factors into account in assessing the "public interest" as an argument for committing a specific case to court or dropping it. However, there is little statistical or anecdotal evidence of such influence.

#### 4.4. Relations with the police

Parliament created the CPS in part to guarantee national uniformity in law enforcement and to provide an impartial evaluation of investigations by the police,<sup>43</sup> whose powers had recently been increased.<sup>44</sup> Consequently, the CPS occupies a position in between the police and the courts in the criminal justice system.

However, although the CPS and police are both part of the executive, they are institutionally, administratively, and financially independent of each other. The CPS is one of the departments supervised by the Attorney General, whose small administrative department is known as the Legal Secretariat to the Law Officers (the Attorney General and his deputy, the Solicitor General). The CPS is a government department without a minister and reports to the Attorney General, whereas the police, although mainly independent local forces, come under the general jurisdiction of the Home Office and report to the Home Secretary. As a result, the CPS has no powers in relation to the appointment, training, and professional development of investigating police officers. It may informally assess their performance by reporting to senior of-

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41 The Attorney General has the power to ban criminal prosecution in individual cases (*nolle prosequi* order) against police informants or representatives of foreign states. A number of offenses, traditionally and mainly those involving corruption of public officials and explosives offenses, require the Attorney General's consent. Although there have been moves by Parliament to remove this requirement in relation to corruption offenses, the government has used the consent of the Attorney General as an assurance to the public that care is being taken in the institution of certain prosecutions. Prime Minister Tony Blair gave such an assurance while answering a question on proposed legislation to create an offense of incitement to religious hatred during Prime Minister's question time on February 9, 2005. The Attorney General also has ultimate power to direct the mounting or stopping of a prosecution. See *Legal Secretariat to the Law Officers: Annual Report* (2003).

42 Code for Crown Prosecutors, published under the provisions of the Prosecution of Offenses Act 1985, Section 10.

43 There are 42 regional police forces, known by the names of their geographical areas, such as the Sussex Police and the Kent Constabulary, and a number of jurisdictional forces, such as the British Transport Police.

44 See Police and Criminal Evidence Act of 1984; as mentioned earlier, there were concerns about miscarriages of justice and the referral of minor cases to the Crown Court.

ficers on the good or bad performance of an officer in a particular case, but it cannot nominate them for promotion, demotion, or other discipline.

The CPS and the police are also independent of each other in their law enforcement work. The police are solely responsible for investigation, while the CPS is responsible for prosecuting cases before the courts—and thus also for determining whether and how charges should be presented to a court. In carrying out their law enforcement work, the police act solely under the operational management of the local Chief Constable. The CPS may not order the police to conduct an investigation, direct the course of an investigation, or dictate what evidence needs to be gathered. Similarly, the police are not obliged to report to the CPS every offense on which information is available to them, or even those on which they have started working. When the CPS determines that additional investigative action is required, the police are not bound to comply with its views. In practice, it is rare for such a request to be refused, as the CPS has the ultimate power to refuse to continue with a prosecution if it considers that there is insufficient evidence. The police may seek the CPS' advice at their discretion,<sup>45</sup> and such consultations with the CPS are becoming more common in the wake of recent initiatives.<sup>46</sup>

The institutional separation of prosecution and the police is reflected in their roles in pre-trial procedure. Unlike prosecutors on the continent, English prosecutors are excluded from the investigation by law. The police act independently of the CPS when they receive information about an offense. If a suspect is identified, the police have traditionally decided whether or not to bring charges.<sup>47</sup> More recent developments have required the police to seek the approval of a prosecutor before charging a suspect with a criminal offense. If the police do not bring charges, they may nonetheless formally or informally caution the suspect.<sup>48</sup> The CPS has no involvement in this process, but on reading a file marked by the police for prosecution, a prosecutor may return it with a recommendation that a caution be administered.

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45 One of the duties of the CPS is to provide appropriate advice and guidance to the police on matters related to offenses committed prior to the completion of the police investigation. Prosecution of Offenses Act 1985, Section 3(1)(c). The CPS is consulted by the police mainly in order to determine whether a pre-trial (police) investigation should be carried out and/or charges should be brought against the suspect.

46 Indeed, in recent months prosecutors have been placed in police stations in order to give early and immediate advice. For out-of-hours consultation, a telephone advice service known as CPS Direct has been established. This service operates at night and during weekends and public holidays. There is one national number, and any police force can use the service when it requires urgent advice. On a human resources note, CPS Direct uses many staff members who are on maternity leave or taking career breaks, as the prosecutors involved work from home.

47 Charges must normally be brought within 24 hours of a suspect's detention. The police may detain a suspect for further investigation prior to charging for up to a total of 96 hours with the authorization of a magistrate's court. In these proceedings before a magistrates' court, the police may appear themselves in straightforward cases. The CPS appears in more complex cases.

48 A formal caution may be issued by a high-ranking police officer if the offender has admitted his/her guilt to the police. This creates a criminal record for the offender but is not a conviction by a court. Ironically, although convictions may be expunged from a person's record over time (Rehabilitation of Offenders Act 1974), this does not apply to cautions.

Once a defendant has been charged, the police usually conduct further investigations in order to prepare the case for presentation to the CPS. They submit an initial file to the CPS that is sufficient for a remand/bail hearing. Only upon conclusion of the investigation and submission of the investigation file to the CPS can a prosecutor formally review the file. The CPS then examines cases submitted by the police, assesses the evidence, and decides on that basis whether to prosecute. If the examining prosecutor decides that the evidence is insufficient, he may drop the proceedings or file a lesser charge. If the case is dropped, it can be reinstated should further compelling evidence be found. It is the CPS practice in such cases to inform the defendant that this could be the case. If, in the prosecutor's view, the case is weak, he/she can ask, but not direct, the police to continue inquiries in order to obtain further evidence.

In recent years, the division of labor between the police and the CPS has been further rationalized, focusing the police exclusively on investigation and involving the CPS much earlier in the charging process.<sup>49</sup> The DPP has issued guidance in accordance with the new rules, and Crown Prosecutors determine in all criminal cases whether a person is to be charged, except for minor or straightforward offenses specified in the DPP's guidance, which the police may continue to charge. The DPP's guidance will be issued to all 42 police forces in England and Wales by the end of March 2007.

Police are not the only bodies to initiate criminal prosecutions. Other public bodies, such as Customs and Excise and the Serious Fraud Office, are empowered to conduct pre-trial investigation of offenses in their field, bring charges, and prosecute them before the court. The CPS has no responsibility for or control over these bodies; its authority is confined to cases initiated by the police. However, because of failures in investigation and prosecution, particularly in Customs and Excise prosecutions, certain control mechanisms have been put in place for investigative bodies other than the police, such as Customs Officers; but they have never been exercised in respect of another prosecuting authority.<sup>50</sup>

In addition, private individuals can initiate and present cases for prosecution (private prosecutions).<sup>51</sup> The CPS may take over a private prosecution.<sup>52</sup> Once the CPS has taken over such a case, the prosecutor may drop the charges if there are no grounds for prosecution. Should a private prosecutor feel aggrieved at the CPS' decision, the only course of action open to him/her would be to initiate proceedings for judicial review. If a private person unjustifiably and repeatedly pursues prosecutions, civil proceedings could be initiated for malicious prosecution or to have the private prosecutor declared a vexatious litigant.

Private prosecution has a long history in English criminal law, and its retention after the formation of the CPS was in part intended to ensure that improper political influences would not prevent an otherwise justifiable prosecution.<sup>53</sup> However, research

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49 The new charging provisions are contained in Section 37(A)(1)(a) of the Police and Criminal Evidence Act 1984, as inserted by the Criminal Justice Act 2003.

50 Prosecution of Offenses Act Section 3(2)(b).

51 Prosecution of Offenses Act, Section 6.

52 Prosecution of Offenses Act, Section 6.

53 Private prosecutions are most often instituted by relatives of crime victims whose cases the CPS has

conducted following the creation of the CPS indicates that private prosecution by individuals is often frivolous and results, in most instances, in unjustified public expense. The available data suggests that a very large number of private prosecutions fail to meet the burden of proof, while the number of cases in which the CPS has erred in refusing to bring a case before the courts is extremely low. As mentioned above, judicial review may be used to challenge the refusal or unwillingness of the competent authorities to initiate and conduct criminal proceedings.

#### 4.5. Relations with the judiciary

The judiciary consists only of the courts. The CPS and the courts are administratively separate and have separate budgets. The CPS' budget, as described above, is provided directly by the Treasury in consultation with the Attorney General. The courts' budget is provided through the Department for Constitutional Affairs (formerly the Lord Chancellor's Department), headed by the Lord Chancellor, who is a Cabinet minister, speaker of the House of Lords, a judge on the Judicial Committee of the House of Lords, and head of the judiciary. He is thus a member of the executive, the legislature, and the judiciary.

No legal obstacles exist to prosecutors becoming judges and vice versa; in practice, however, this rarely occurs. Although judicial vacancies are filled through an open competition,<sup>54</sup> in practice only lawyers with current experience in the higher courts are eligible for consideration. Prosecutors are, therefore, hampered by their limited rights of audience and an enduring aversion, mainly on the part of the Bar, to lawyers who prosecute but do not defend. This aversion does not work in reverse, so that defense solicitors can readily apply to become judges. Judges themselves seldom apply to become prosecutors, as prosecutors enjoy lower social and professional status and lower pay.<sup>55</sup> These differences stem naturally from the common law system. Judges are senior lawyers who sit in criminal courts as referees of the proceedings and guardians of the law; they are not part of a parallel profession, as in civil law systems.

In the discharge of their duties and the organization of their professions, judges and prosecutors enjoy an equal overall level of autonomy and independence from each other. The independence of judges and prosecutors serves different purposes. The purpose of prosecutorial independence is to ensure prosecutors' ability to establish the offender's guilt without influence, while the purpose of judges' independence is more balanced between the general public interest and the rights of the accused individual—itself a guarantee of legality and equity for all members of the public. Consequently, judges have no power to institute criminal proceedings or file charges. Judges may not rule on refusals to open pre-trial proceedings, nor may they refer

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decided not to prosecute.

54 The only exceptions are the members of the Judicial Committee of the House of Lords, who are political appointees.

55 Judges receive between £ 86,000 and £190,000 a year, whereas prosecutors receive between £26,000 and £130,000 a year.



cases to the CPS or police for further investigation. These matters entirely fall within the competence of the CPS or the police, respectively.

Early expectations following the creation of the CPS in 1986 predicted a negative impact on the workload of the courts; these expectations have not been borne out.<sup>56</sup>

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## **V. Publicizing the Prosecution Service's Activity**

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The CPS has a large, professional press office situated at its headquarters, which deals with press inquiries about individual cases and about the CPS in general. The press office also puts out press releases when the CPS wishes to publicize its policies or activities and arranges radio and television interviews for the Director. The head of the press office is usually a member of the central Government Information Service.

Each CPS area also has a member of staff who is responsible for press liaison for the area locally and for liaising with the main press office. However, this person is not a professional press officer, but is usually one of the local prosecutors.

The press in the United Kingdom is free and very active, to the point of intrusiveness. Criminal cases are routinely reported in all newspapers, both national and local. Press criticism undoubtedly puts pressure on prosecutors, with the potential for interference with the independence of decision-making. However, there is no evidence of this being a concern at present.

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## **VI. Statistics**

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Budget Allocations (millions of Pounds Sterling)

	<b>2001 – 02</b>	<b>2002 – 03</b>
Administrative expenses	***	336
Criminal prosecution expenses	***	105
<b>Total</b>	<b>392</b>	<b>441</b>

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<sup>56</sup> One reason there has been no significant impact on the courts is that, although the CPS has filtered out many cases, the rise in crime generally has more than compensated for this.

## Outcomes of Magistrates' Courts operations

	1999 – 00	2000 – 01	2001 – 02
Cases examined by court	73.0%	72.8%	72.5%
Cases dropped by CPS	12.2%	13.0%	13.1%
Cases committed to Crown Courts	6.4%	6.4%	6.7%
Others (charges dropped by the court after hearing evidence, defendant deceased, failure to identify offender)	8.3%	7.7%	7.7%

## Outcomes of Crown Courts operations

	1999 – 00	2000 – 01	2001 – 02
Cases examined by court	85.5%	84.4%	82.4%
Cases that were not examined*	11.1%	12.3%	14%
The court obligates defendant to comply with public order without examining the case	1.8%	1.7%	1.7%
Others (defendant deceased, failure to identify offender)	1.6%	1.6%	1.9%

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\* Cases in which the court has found irregularities, defendants have serious health problems, or witnesses fail to appear; in such cases, the CPS usually does not submit evidence, and the court pronounces an acquittal.

2000 – 2001 *Annual Report of the Chief Inspector of the Crown Prosecution Service Inspectorate*

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Criminal Justice System Bulletin

## **Annex A**

### **The Code for Crown Prosecutors**

#### *1. Introduction*

1. The decision to prosecute an individual is a serious step. Fair and effective prosecution is essential to the maintenance of law and order. Even in a small case a prosecution has serious implications for all involved—victims, witnesses and defendants. The Crown Prosecution Service applies the Code for Crown Prosecutors so that it can make fair and consistent decisions about prosecutions.
2. The Code helps the Crown Prosecution Service to play its part in making sure that justice is done. It contains information that is important to police officers and others who work in the criminal justice system and to the general public. Police officers should apply the provisions of this Code whenever they are responsible for deciding whether to charge a person with an offense.
3. The Code is also designed to make sure that everyone knows the principles that the Crown Prosecution Service applies when carrying out its work. By applying the same principles, everyone involved in the system is helping to treat victims, witnesses and defendants fairly, while prosecuting cases effectively.

#### *2. General Principles*

1. Each case is unique and must be considered on its own facts and merits. However, there are general principles that apply to the way in which Crown Prosecutors must approach every case.
2. Crown Prosecutors must be fair, independent and objective. They must not let any personal views about ethnic or national origin, disability, sex, religious beliefs, political views or the sexual orientation of the suspect, victim or witness influence their decisions. They must not be affected by improper or undue pressure from any source.
3. It is the duty of Crown Prosecutors to make sure that the right person is prosecuted for the right offense. In doing so, Crown Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.
4. Crown Prosecutors should provide guidance and advice to investigators throughout the investigative and prosecuting process. This may include lines of inquiry, evidential requirements and assistance in any pre-charge procedures.

Crown Prosecutors will be proactive in identifying and, where possible, rectifying evidential deficiencies and in bringing to an early conclusion those cases that cannot be strengthened by further investigation.

5. It is the duty of Crown Prosecutors to review, advise on and prosecute cases, ensuring that the law is properly applied, that all relevant evidence is put before the court and that obligations of disclosure are complied with, in accordance with the principles set out in this Code.
6. The Crown Prosecution Service is a public authority for the purposes of the Human Rights Act 1998. Crown Prosecutors must apply the principles of the European Convention on Human Rights in accordance with the Act.

### 3. *The Decision To Prosecute*

1. In most cases, Crown Prosecutors are responsible for deciding whether a person should be charged with a criminal offense, and if so, what that offense should be. Crown Prosecutors make these decisions in accordance with this Code and the Director's Guidance on Charging. In those cases where the police determine the charge, which are usually more minor and routine cases, they apply the same provisions.
2. Crown Prosecutors make charging decisions in accordance with the Full Code Test (see section 5 below), other than in those limited circumstances where the Threshold Test applies (see section 6 below).
3. The Threshold Test applies where the case is one in which it is proposed to keep the suspect in custody after charge, but the evidence required to apply the Full Code Test is not yet available.
4. Where a Crown Prosecutor makes a charging decision in accordance with the Threshold Test, the case must be reviewed in accordance with the Full Code Test as soon as reasonably practicable, taking into account the progress of the investigation.

### 4. *Review*

1. Each case the Crown Prosecution Service receives from the police is reviewed to make sure that it is right to proceed with a prosecution. Unless the Threshold Test applies, the Crown Prosecution Service will only start or continue with a prosecution when the case has passed both stages of the Full Code Test.
2. Review is a continuing process and Crown Prosecutors must take account of any change in circumstances. Wherever possible, they should talk to the police first if they are thinking about changing the charges or stopping the case. Crown Prosecutors should also tell the police if they believe that some additional evidence may strengthen the case. This gives the police the chance to provide more information that may affect the decision.
3. The Crown Prosecution Service and the police work closely together, but the final responsibility for the decision whether or not a charge or a case should go ahead rests with the Crown Prosecution Service.

## *5. The Full Code Test*

1. The Full Code Test has two stages. The first stage is consideration of the evidence. If the case does not pass the evidential stage it must not go ahead no matter how important or serious it may be. If the case does pass the evidential stage, Crown Prosecutors must proceed to the second stage and decide if a prosecution is needed in the public interest. The evidential and public interest stages are explained below.

### *The Evidential Stage*

2. Crown Prosecutors must be satisfied that there is enough evidence to provide a “realistic prospect of conviction” against each defendant on each charge. They must consider what the defense case may be, and how that is likely to affect the prosecution case.
3. A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates or judge hearing a case alone, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a separate test from the one that the criminal courts themselves must apply. A court should only convict if satisfied so that it is sure of a defendant’s guilt.
4. When deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used and is reliable. There will be many cases in which the evidence does not give any cause for concern. But there will also be cases in which the evidence may not be as strong as it first appears. Crown Prosecutors must ask themselves the following questions:

#### **Can the evidence be used in court?**

- a. Is it likely that the evidence will be excluded by the court? There are certain legal rules which might mean that evidence which seems relevant cannot be given at a trial. For example, is it likely that the evidence will be excluded because of the way in which it was gathered? If so, is there enough other evidence for a realistic prospect of conviction?

#### **Is the evidence reliable?**

- b. Is there evidence which might support or detract from the reliability of a confession? Is the reliability affected by factors such as the defendant’s age, intelligence or level of understanding?
- c. What explanation has the defendant given? Is a court likely to find it credible in the light of the evidence as a whole? Does it support an innocent explanation?
- d. If the identity of the defendant is likely to be questioned, is the evidence about this strong enough?
- e. Is the witness’s background likely to weaken the prosecution case? For example, does the witness have any motive that may affect his or her attitude to the case, or a relevant previous conviction?

- f. Are there concerns over the accuracy or credibility of a witness? Are these concerns based on evidence or simply information with nothing to support it? Is there further evidence which the police should be asked to seek out which may support or detract from the account of the witness?
5. Crown Prosecutors should not ignore evidence because they are not sure that it can be used or is reliable. But they should look closely at it when deciding if there is a realistic prospect of conviction.

*The Public Interest Stage*

6. In 1951, Lord Shawcross, who was Attorney General, made the classic statement on public interest, which has been supported by Attorneys General ever since: “It has never been the rule in this country—I hope it never will be—that suspected criminal offenses must automatically be the subject of prosecution.” (House of Commons Debates, volume 483, column 681, 29 January 1951.)
7. The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed. A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour, or it appears more appropriate in all the circumstances of the case to divert the person from prosecution (see section 8 below).
8. Crown Prosecutors must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offense or the circumstances of the suspect. Some factors may increase the need to prosecute but others may suggest that another course of action would be better.

*The following lists of some common public interest factors, both for and against prosecution, are not exhaustive. The factors that apply will depend on the facts in each case.*

*Some common public interest factors in favor of prosecution*

9. The more serious the offense, the more likely it is that a prosecution will be needed in the public interest. A prosecution is likely to be needed if:
  - a. a conviction is likely to result in a significant sentence;
  - b. a conviction is likely to result in a confiscation or any other order;
  - c. a weapon was used or violence was threatened during the commission of the offense;
  - d. the offense was committed against a person serving the public (for example, a police or prison officer, or a nurse);
  - e. the defendant was in a position of authority or trust;
  - f. the evidence shows that the defendant was a ringleader or an organizer of the offense;

- g. there is evidence that the offense was premeditated;
- h. there is evidence that the offense was carried out by a group;
- i. the victim of the offense was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance;
- j. the offense was committed in the presence of, or in close proximity to, a child;
- k. the offense was motivated by any form of discrimination against the victim's ethnic or national origin, disability, sex, religious beliefs, political views or sexual orientation, or the suspect demonstrated hostility towards the victim based on any of those characteristics;
- l. there is a marked difference between the actual or mental ages of the defendant and the victim, or if there is any element of corruption;
- m. the defendant's previous convictions or cautions are relevant to the present offense;
- n. the defendant is alleged to have committed the offense while under an order of the court;
- o. there are grounds for believing that the offense is likely to be continued or repeated, for example, by a history of recurring conduct;
- p. the offense, although not serious in itself, is widespread in the area where it was committed; or
- q. a prosecution would have a significant positive impact on maintaining community confidence.

*Some common public interest factors against prosecution*

- 10. A prosecution is less likely to be needed if:
  - a. the court is likely to impose a nominal penalty;
  - b. the defendant has already been made the subject of a sentence and any further conviction would be unlikely to result in the imposition of an additional sentence or order, unless the nature of the particular offense requires a prosecution or the defendant withdraws consent to have an offense taken into consideration;
  - c. the offense was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offense);
  - d. the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgment;
  - e. there has been a long delay between the offense taking place and the date of the trial, unless:
    - ▶ the offense is serious;
    - ▶ the delay has been caused in part by the defendant;
    - ▶ the offense has only recently come to light; or



- ▶ the complexity of the offense has meant that there has been a long investigation;
  - f. a prosecution is likely to have a bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offense;
  - g. the defendant is elderly or is, or was at the time of the offense, suffering from significant mental or physical ill health, unless the offense is serious or there is real possibility that it may be repeated. The Crown Prosecution Service, where necessary, applies Home Office guidelines about how to deal with mentally disordered offenders. Crown Prosecutors must balance the desirability of diverting a defendant who is suffering from significant mental or physical ill health with the need to safeguard the general public;
  - h. the defendant has put right the loss or harm that was caused (but defendants must not avoid prosecution or diversion solely because they pay compensation); or
  - i. details may be made public that could harm sources of information, international relations or national security.
11. Deciding on the public interest is not simply a matter of adding up the number of factors on each side. Crown Prosecutors must decide how important each factor is in the circumstances of each case and go on to make an overall assessment.

*The relationship between the victim and the public interest*

12. The Crown Prosecution Service does not act for victims or the families of victims in the same way as solicitors act for their clients. Crown Prosecutors act on behalf of the public and not just in the interests of any particular individual. However, when considering the public interest, Crown Prosecutors should always take into account the consequences for the victim of whether or not to prosecute, and any views expressed by the victim or the victim's family.
13. It is important that a victim is told about a decision which makes a significant difference to the case in which they are involved. Crown Prosecutors should ensure that they follow any agreed procedures.

*6. The Threshold Test*

1. The Threshold Test requires Crown Prosecutors to decide whether there is at least a reasonable suspicion that the suspect has committed an offense, and if there is, whether it is in the public interest to charge that suspect.
2. The Threshold Test is applied to those cases in which it would not be appropriate to release a suspect on bail after charge, but the evidence to apply the Full Code Test is not yet available.
3. There are statutory limits that restrict the time a suspect may remain in police custody before a decision has to be made whether to charge or release the suspect. There will be cases where the suspect in custody presents a substantial bail risk if released, but much of the evidence may not be available at the time the

charging decision has to be made. Crown Prosecutors will apply the Threshold Test to such cases for a limited period.

4. The evidential decision in each case will require consideration of a number of factors including:
  - ▶ the evidence available at the time;
  - ▶ the likelihood and nature of further evidence being obtained;
  - ▶ the reasonableness for believing that evidence will become available;
  - ▶ the time it will take to gather that evidence and the steps being taken to do so;
  - ▶ the impact the expected evidence will have on the case;
  - ▶ the charges that the evidence will support.
5. The public interest means the same as under the Full Code Test, but will be based on the information available at the time of charge which will often be limited.
6. A decision to charge and withhold bail must be kept under review. The evidence gathered must be regularly assessed to ensure the charge is still appropriate and that continued objection to bail is justified. The Full Code Test must be applied as soon as reasonably practicable.

#### *7. Selection Of Charges*

1. Crown Prosecutors should select charges which:
  - a. reflect the seriousness and extent of the offending;
  - b. give the court adequate powers to sentence and impose appropriate post-conviction orders; and
  - c. enable the case to be presented in a clear and simple way.

This means that Crown Prosecutors may not always choose or continue with the most serious charge where there is a choice.

2. Crown Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one.
3. Crown Prosecutors should not change the charge simply because of the decision made by the court or the defendant about where the case will be heard.

#### *8. Diversion From Prosecution*

##### **Adults**

1. When deciding whether a case should be prosecuted in the courts, Crown Prosecutors should consider the alternatives to prosecution. Where appropriate, the availability of suitable rehabilitative, reparative or restorative justice processes can be considered.

2. Alternatives to prosecution for adult suspects include a simple caution and a conditional caution.

### **Simple caution**

3. A simple caution should only be given if the public interest justifies it and in accordance with Home Office guidelines. Where it is felt that such a caution is appropriate, Crown Prosecutors must inform the police so they can caution the suspect. If the caution is not administered, because the suspect refuses to accept it, a Crown Prosecutor may review the case again.

### **Conditional caution**

4. A conditional caution may be appropriate where a Crown Prosecutor considers that while the public interest justifies a prosecution, the interests of the suspect, victim and community may be better served by the suspect complying with suitable conditions aimed at rehabilitation or reparation. These may include restorative processes.
5. Crown Prosecutors must be satisfied that there is sufficient evidence for a realistic prospect of conviction and that the public interest would justify a prosecution should the offer of a conditional caution be refused or the offender fails to comply with the agreed conditions of the caution.
6. In reaching their decision, Crown Prosecutors should follow the Conditional Caution Code of Practice and any guidance on conditional cautioning issued or approved by the Director of Public Prosecutions.
7. Where Crown Prosecutors consider a conditional caution to be appropriate, they must inform the police, or other authority responsible for administering the conditional caution, as well as providing an indication of the appropriate conditions so that the conditional caution can be administered.

### **Youths**

8. Crown Prosecutors must consider the interests of a youth when deciding whether it is in the public interest to prosecute. However Crown Prosecutors should not avoid prosecuting simply because of the defendant's age. The seriousness of the offense or the youth's past behavior is very important.
9. Cases involving youths are usually only referred to the Crown Prosecution Service for prosecution if the youth has already received a reprimand and final warning, unless the offense is so serious that neither of these were appropriate or the youth does not admit committing the offense. Reprimands and final warnings are intended to prevent re-offending and the fact that a further offense has occurred indicates that attempts to divert the youth from the court system have not been effective. So the public interest will usually require a prosecution in such cases, unless there are clear public interest factors against prosecution.

## **9. Mode Of Trial**

1. The Crown Prosecution Service applies the current guidelines for magistrates

who have to decide whether cases should be tried in the Crown Court when the offense gives the option and the defendant does not indicate a guilty plea. Crown Prosecutors should recommend Crown Court trial when they are satisfied that the guidelines require them to do so.

2. Speed must never be the only reason for asking for a case to stay in the magistrates' courts. But Crown Prosecutors should consider the effect of any likely delay if they send a case to the Crown Court, and any possible stress on victims and witnesses if the case is delayed.

#### *10. Accepting Guilty Pleas*

1. Defendants may want to plead guilty to some, but not all, of the charges. Alternatively, they may want to plead guilty to a different, possibly less serious, charge because they are admitting only part of the crime. Crown Prosecutors should only accept the defendant's plea if they think the court is able to pass a sentence that matches the seriousness of the offending, particularly where there are aggravating features. Crown Prosecutors must never accept a guilty plea just because it is convenient.
2. In considering whether the pleas offered are acceptable, Crown Prosecutors should ensure that the interests of the victim and, where possible, any views expressed by the victim or victim's family, are taken into account when deciding whether it is in the public interest to accept the plea. However, the decision rests with the Crown Prosecutor.
3. It must be made clear to the court on what basis any plea is advanced and accepted. In cases where a defendant pleads guilty to the charges but on the basis of facts that are different from the prosecution case, and where this may significantly affect sentence, the court should be invited to hear evidence to determine what happened, and then sentence on that basis.
4. Where a defendant has previously indicated that he or she will ask the court to take an offense into consideration when sentencing, but declines to admit that offense at court, Crown Prosecutors will consider whether a prosecution is required for that offense. Crown Prosecutors should explain to the defense advocate and the court that the prosecution of that offense may be subject to further review.
5. Particular care must be taken when considering pleas which would enable the defendant to avoid the imposition of a mandatory minimum sentence. When pleas are offered, Crown Prosecutors must bear in mind the fact that ancillary orders can be made with some offenses but not with others.

#### *11. Prosecutors' Role In Sentencing*

1. Crown Prosecutors should draw the court's attention to:
  - ▶ any aggravating or mitigating factors disclosed by the prosecution case;
  - ▶ any victim personal statement;
  - ▶ where appropriate, evidence of the impact of the offending on a community;

- ▶ any statutory provisions or sentencing guidelines which may assist;
  - ▶ any relevant statutory provisions relating to ancillary orders (such as anti-social behavior orders).
2. Crown Prosecutors should challenge any assertion made by the defense in mitigation that is inaccurate, misleading or derogatory. If the defense persist in the assertion, and it appears relevant to the sentence, the court should be invited to hear evidence to determine the facts and sentence accordingly.

#### 12. *Re-starting a Prosecution*

1. People should be able to rely on decisions taken by the Crown Prosecution Service. Normally, if the Crown Prosecution Service tells a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped, that is the end of the matter and the case will not start again. But occasionally there are special reasons why the Crown Prosecution Service will re-start the prosecution, particularly if the case is serious.
2. These reasons include:
  - a. rare cases where a new look at the original decision shows that it was clearly wrong and should not be allowed to stand;
  - b. cases which are stopped so that more evidence which is likely to become available in the fairly near future can be collected and prepared. In these cases, the Crown Prosecutor will tell the defendant that the prosecution may well start again; and
  - c. cases which are stopped because of a lack of evidence but where more significant evidence is discovered later.
3. There may also be exceptional cases in which, following an acquittal of a serious offense, the Crown Prosecutor may, with the written consent of the Director of Public Prosecutions, apply to the Court of Appeal for an order quashing the acquittal and requiring the defendant to be retried, in accordance with Part 10 of the Criminal Justice Act 2003.

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# Report on the Prosecution Service in France

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Rada Smedovska  
François Falletti





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## I. General Issues

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The prosecution service in France has the important mission of protecting the general interest and speaking on behalf of society in the judicial system; therefore, both each individual prosecutor and the institution as a whole are provided with strong guarantees of independence. The members of the prosecution service (also called *le Ministère Public* and commonly known as the *Parquet*) follow an old tradition. Both magistrates and judges belong to the judiciary, but the level of independence granted each is not the same. Thus while they do not receive the same guarantees as judges (the prosecution offices must have a link to the executive branch, in order to enforce the criminal policy set by the government in their daily work), they must be granted sufficient autonomy and professional protection to conduct their investigations and make their decisions within a well-functioning judicial system. This balance may be measured based on the powers they are granted in criminal proceedings and the guarantees attached to their appointment and career. Reforms in 1993 and 1994 greatly improved the situation through modifications to the French Constitution, the Magistrate's Act, and the Criminal Procedure Code. The current situation will be explained below. Those changes appeared necessary following important media debates about cases of political financing involving members of the government, other politicians, and businessmen in the early nineties; it appeared then that the link between prosecutors and the Ministry of Justice was not sufficiently clear. The penal code has therefore been modified to organize these relationships more transparently. At the same time, the French Constitution has been modified to grant more independence and powers to the Superior Council of the Magistracy (*Conseil Supérieur de la Magistrature*)<sup>1</sup> in the appointment and disciplining of judges and prosecutors.

*The search for balance:* Nonetheless, there has been longstanding concern about supposed undue executive influence on the prosecution services. In 1997, the President of the Republic asked a group of experts chaired by Pierre Truche to develop recommendations on reforming the relationship between the executive and the Prosecution Service; the observations and recommendations produced by the Truche Commission<sup>2</sup> address several aspects of the *Parquet's* role as an independent institution.

The Commission first noted that the intervention of the executive, especially the Minister of Justice, in the operations of the *Parquet* through the use of instructions had created a sense of "attachment" and the *Parquet's* dependency on the executive. In response, it proposed several reforms that would have limited the authority of the Ministry and other institutions, for example by limiting the Minister's ability to give instructions in specific cases and granting the Superior Council of the Magistracy (SCM)

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1 See Section 4.1 below.

2 The Commission (*Commission de réflexion sur la justice*), established in 1997, was headed by Pierre Truche, a former president of the Court of Cassation.

greater authority to guide policy, as well as some that would have made the hierarchal authority of the Ministry more transparent, such as requiring the Ministry to adopt a national “criminal prosecution policy” (*politique d’action publique*) to promote uniformity in the application of law and reduce arbitrariness—in effect increasing central control.

Some of the recommendations of the Truche Commission were included in a Law of March 9, 2004 that changed a large number of provisions of the criminal code and the code of criminal procedure, especially concerning the organization of relationships within the hierarchy of the prosecution service from the bottom to the top level. However, others proposals, especially those increasing the power of the Superior Council of the Magistracy and involving the appointment process, could not achieve sufficient parliamentary support to allow the adoption of new constitutional reform and other legislative changes. The debates especially highlighted the fact that the 1993-1994 reforms provided an effective equilibrium between the two above mentioned concerns: on the one hand, maintaining links between the prosecution office and criminal policy, and on the other hand, providing the prosecutor sufficient guarantees to contribute to a fully independent justice system.

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## II. Structure and Organization of the Prosecution Service

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### 2.1. Internal structure

The principal divisions of the *Parquet* largely mirror the organization of the courts. There are some 185 district level Prosecution Offices, headed by a District Prosecutor (*Procureur de la République*) attached to the district courts, with a total of 1,500 prosecutors<sup>3</sup> and 5,500 judges; there are also 35 Prosecutors General and their deputies in the Courts of Appeals and the Criminal Courts for serious offenses (*Cour d’Assises*),<sup>4</sup> and one Prosecutor General at the Court of Cassation (Supreme Court). The 185 district-level Prosecution Offices are organized under the supervision of the 35 Prosecutors General of Courts of Appeals (the District Prosecutors—*Procureur de la République*—must report on their own or by request to the relevant Prosecutor General, who can require them to prosecute in a particular case by a written instruction that must be placed in the case file and is thus known to the Court. Each Prosecutor General is also directly involved before the Court of Appeals at the second

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3 Including district prosecutors and their deputies or substitutes, Prosecutors General of Courts of Appeals and their deputies, and the Prosecutor General of the Court of Cassation and his deputies.

4 The Criminal Court is a judicial body competent to act as a first and second instance in regard to the most serious crimes. It consists of three professional judges and a number of laymen (the jury) drawn by lot—nine when the court sits as a first instance, and twelve when it conducts appeal proceedings.

level when the judgment of a district court is appealed). The Prosecutor General of the Court of Cassation, each prosecutor general of the Court of Appeals, and each District Prosecutor is supported by a team of deputies (*substituts*) who also belong to the magistracy.<sup>5</sup>

The *Parquet* is headed by the Minister of Justice, to whom the Prosecutors General at the Court of Appeals and Court of Cassation answer directly.<sup>6</sup> Below the Prosecutors General and supervised by them are District Prosecutors who represent the *Parquet* at the first-instance District Courts.<sup>7</sup> Prosecutors may discharge prosecutorial functions at all first-instance courts of the area in which they are appointed,<sup>8</sup> such as before specialized courts for labor (*conseil des prud'hommes*) or trade (*tribunal du commerce*). A prosecutor may appear before any criminal court dealing with serious offenses or misdemeanors.<sup>9</sup> More generally, each District Prosecutor and each Prosecutor General of a Court of Appeals plays a hierarchical role vis-à-vis his team of deputies.

However, this supervisory power leaves to any member of the *Parquet* in charge of a case the right to speak freely about that case before the court; an old tradition allows them to do so even if they receive different instructions through the hierarchy that they are required to present to the court. In these infrequent situations, the prosecutor informs the court of the instructions he has received but explains that he does not personally support them, based on his own opinion as a magistrate. It is then up to the court to form its own opinion. Even if this does not often happen, this right is very important to prosecutors, who are not simply civil servants, but also part of a magistracy with specific rules of ethics governing the search for the truth. Of course, it is also possible for a prosecutor in such a situation to request that the head of his office remove him from the case.

The *Parquet* is a centralized but “non-concentrated” institution, meaning that it is hierarchal in organization but delegates certain powers to its territorial units; though they do not have full autonomy, they do have delegated powers that they may exercise independently. The hierarchical structure of the *Parquet* means that instructions are passed from the higher level to the next lower level;<sup>10</sup> thus the Minister of Justice gives instructions to the Prosecutor General, the latter to District Prosecutors, and these, in turn, to their deputies. The Minister therefore does not give instructions to

5 In France, the magistracy includes both judges and prosecutors, for a total of more than 7,000 people dealing with civil and criminal cases. Judges are granted full independence, while prosecutors work in a hierarchical structure. Their common membership in the magistracy allows judges and prosecutors to spend a period of their career in either one of those functions. It is based on the idea that a fully independent justice system requires thorough involvement on the part of the prosecution offices in the strong ethical norms shared by both prosecutors and judges.

6 The position of the Prosecution Office at the Court of Cassation does not fit readily into the parallel structure to the court system, since the Appellate Prosecution Offices, being directly subordinate to the Ministry of Justice, do not receive instructions from the Prosecution Office at the Court of Cassation.

7 *Code de Procédure Pénale* [Criminal Procedure Code], Art. 39 (1)-(2).

8 *Code de l'Organisation Judiciaire du 18 Mars 1978* [Judicial Organization Code of March 18, 1978] [hereinafter *Judicial Organization Code*], Art. L311-15.

9 At the very bottom of the hierarchy are police commissioners who may represent the prosecutor in court for very minor misdemeanors.

10 Frédéric Debove and François Falletti, *Droit Pénal et Procédure Pénale* (June 2006).

prosecutors at the district court level directly, and could not do so. A prosecutor at a given level must follow the policy laid out by his hierarchal superiors; at the same time, because the *Parquet* is “non-concentrated,” a prosecutor must make decisions in applying that policy at his particular level. Individual prosecution units (for instance, those specializing in economic or juvenile offenses) may not disregard the guidelines and instructions of superiors, but must nonetheless adapt them to each specific case.

The Minister of Justice administers and enforces the criminal law at the national level. He is assisted by magistrates acting as civil servants, without any judicial powers, to advise him in determining criminal policy, drafting bills, administering the prison system, etc. At the regional level, Prosecutors General of Courts of Appeals supervise the decisions taken by District Prosecutors; within the area of the Court of Appeals to which he is attached, each Prosecutor General, like the Minister of Justice, can deliver instructions to prosecute a case in written form that must be placed in the case file. They may issue instructions to lower-ranking prosecutors,<sup>11</sup> which must be in writing, just as those of the Minister of Justice must be. In order to discharge their functions, at their discretion Prosecutors General are entitled to convene meetings of the prosecution officers under their jurisdiction to encourage harmonization in law enforcement.<sup>12</sup> District Prosecutors are under a duty to enforce crime policy at the local level; one of their key instruments is their control over the work of the judicial police.

The head of the Prosecution Office may change one of his deputy prosecutors in a given case even after the initial assignment; may nominate, by delegation, another Deputy; or may speak at the hearing himself.<sup>13</sup> In practice, however, each prosecution office is organized so as to determine in advance the role of each Deputy, who thus knows which cases will come to him; most of the time, this organization is followed, and it very seldom happens that a prosecutor is transferred from a case against his wishes.

Because members of the *Parquet* notionally constitute a single body, prosecutors may be replaced or share assignments while acting on behalf of the office—the so-called principle of interchangeability (*indivisibilité du Ministère Public*). In contrast to judges, who may be replaced only according to strict legal rules, prosecutors are more easily replaced. For example, in a given case deputies may take turns, with one directing the operations of the judicial police, another conducting investigations, a third dealing with evidentiary material, and a fourth issuing a decree closing the investigation.

11 Criminal Procedure Code, Art. 37.

12 *Rapport au Président de la République de la commission de réflexion sur la justice* (Report to the President of the Republic on the Commission to Consider the Justice System) (1997), available at <http://www.ladocumentationfrancaise.fr/rapports-publics/974072100/index.shtml> (hereinafter *Report of the Truche Commission*).

13 There are no statutory standards regulating case distribution and assignment. There are only internal organizational decisions made by the head of office (Prosecutor General of the Court of Appeals or District Prosecutor at the local level regarding their deputies).

Such replacement or sharing of assignments does not require any order from a superior prosecutor to distribute the workload among individual prosecutors.<sup>14</sup> The principle of interchangeability is absolute, and even if the act of a deputy contravenes the instructions of the superior prosecutor, it will be considered valid and appropriate, as long as it is otherwise in compliance with the laws. (In such a case, the lower-ranking deputy might be subject to disciplinary sanctions, but his acts may not be rescinded.) Thus the assignment of a deputy prosecutor to a specific case has serious legal consequences and can involve the entire prosecution office.

*Performance Management:* Each District Prosecutor must keep the Prosecutor General of the Court of Appeals informed about serious cases and about more general issues involving criminal policy.

## 2.2. Budgetary process

The budget of a prosecution office is allocated according to a technical process at the local, regional, and national level. The political discussion takes place before Parliament each year, based on a proposal presented by the Minister of Justice. Each court determines its financial resources and makes a proposal or recommendation to the Ministry of Justice in the spring; the general budget of the Ministry is then discussed in Parliament between October and December. At the beginning of the following year, each court and its attached prosecution service is allocated a global budget, whose implementation is decided on jointly by the President of the Court and the head of the prosecution office attached to it. Each of the 35 Courts of Appeals gathers the budgetary needs of the different district courts at the regional level and submits them, after some arbitration by both the Prosecutor General and the President of the Court of Appeals, to the Ministry of Justice. Prosecution offices thus do not have separate budgets—a function of the identification of both judges and prosecutors as magistrates.

A new system for preparing the budget was introduced in 2003: A five-year budget was programmed, with the 2003 budget representing one-fifth of the funds available for the period.

This is a special financial effort desired by the government in order to help improve the functioning of the courts and the entire judicial system; however, this program must be confirmed and updated each year by the parliament in the traditional way.

The 2003 budget for the magistracy increased by 7.43 percent over the previous year; since then, increases have been adopted year after year at the same level. It is not clear from available information what share of funds went to the *Parquet* as opposed to the judiciary, or even if any such distinction was made.

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14 Laurent Lemesle and Frédéric-Jérôme Pansier, *Le Procureur de la République* (1998), at 43.

### 2.3. The status of the Prosecutor General

There is no Prosecutor General at the national level; rather, the Minister of Justice is the head of the *Parquet*. The Prosecutor General at the Court of Cassation, though notionally the ranking prosecutor, only has powers with regard to that Court. The 35 regional Prosecutors General of Courts of Appeals attached to the Courts of Appeals are equal in standing.

The Minister of Justice is a member of the government and a political appointee. He is not necessarily a Member of Parliament. The Minister is assisted at the Ministry by civil servants specializing in criminal law, civil law, budget, and other matters relating to the administration of the *Parquet*; some of these people are traditionally appointed by the Ministry of Justice from within the magistracy.

### 2.4. The status of individual prosecutors

The Prosecutors General attached to Courts of Appeals and the District Prosecutors attached to first-instance District Courts, as well as their deputies (*substituts*), are all magistrates and members of the *Parquet*. For misdemeanor cases (lowest level offenses), a police officer deals with the cases, under the supervision of the relevant District Prosecutor. The status of Prosecutors General and of other prosecutors is almost identical, save for the procedure for their appointment.

*Appointment:* Prosecutors General of Courts of Appeals are directly appointed by the Council of Ministers (government) and appointed by decree by the President of the Republic; thus the SCM is not involved in their appointment. The President of the Republic can follow or ignore the government's recommendation. The Prosecutor General must be a magistrate and is nearly always a member of the *Parquet*. All other prosecutors are appointed by the President by decree following consultations with the SCM. The particular method of appointing Prosecutors General of Court of Appeals has sometimes led to questions about undue executive influence over the career path of prosecutors, given the different methods of appointment; it has, however, appeared important to retain a special method of appointing Prosecutors General, due to their responsibilities in the implementation of crime policy.

There is a hierarchy of appointed ranks within the *Parquet*, determined by decree of the Minister of Justice. There are two levels: the higher first-level rank, and the lower second-level rank. The lower rank is open to magistrates at the beginning of their career. After seven years, they can apply to the higher level if they obtain the agreement of the promotional committee.<sup>15</sup> Around 10 percent of magistrates are considered to be above those two ranks and are classified as “*hors hiérarchie*.”

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<sup>15</sup> See paragraph below on promotion.

Since the list of prosecutors “*hors hiérarchie*” was considerably extended in 2002,<sup>16</sup> it may be assumed that one of the reform’s objectives was to provide more career opportunities for prosecutors, in consideration of demographic developments.

Most prosecutors begin their career following university graduation through a competition for a two-year training program at the National School of the Magistracy (*Ecole Nationale de la Magistrature*). They can then choose to work as either a judge or a prosecutor. This is the main way of recruiting prosecutors. In addition, specific competitions may also provide access to the training program at the National School of the Magistracy to people with some professional experience.<sup>17</sup>

It is also possible to enter the magistracy directly; however, this track is limited to a small percentage of recruitment (5 to 10 percent).<sup>18</sup> In order to be appointed directly to the second level, individuals must be at least 35 years of age, meet the general eligibility requirements (hold a diploma in legal studies, have French nationality, etc.), and have accumulated seven years of “professional experience that qualifies them as exceptionally fit to discharge judicial functions.” For first-level appointments, candidates need to satisfy the same general eligibility requirements, save that the minimum length of service is 17 years.

Appointments through this procedure occur following mandatory consultations with the Promotions Committee sitting as a selection committee; its opinion is binding.<sup>19</sup> The Committee determines the rank and official position to which candidates may be appointed; at its discretion, a candidate may be obliged to undergo preliminary training for a set period of time or take an internship prior to assuming office.

Special competitions may also be organized, open to experienced people whose number depends on the need for new magistrates.

For all forms of appointment, candidates must be resident within the area of the office to which they will be appointed, unless the Minister of Justice makes an exception following consultation with the Prosecutor General of the Court of Appeals.<sup>20</sup> A candidate’s marital status may also be taken into account with regard to appointment.<sup>21</sup>

*Tenure:* Magistrates in the *Parquet* are appointed to permanent terms, even if, unlike judges, they can in theory be removed from their position due to the needs of the Prosecution Service.<sup>22</sup> Judges can never have their position changed—meaning

16 *Décret pris en Conseil des Ministres—1er janvier 2002* [Council of Ministers decree n°2001-1380 of January 1, 2002 (modifying Decree n° 93-21 of January 1993)], January 1, 2002.

17 Candidates need to meet general eligibility requirements: a recognized four-year degree in legal studies; French nationality; civil capacity; completion of military service; and good physical condition.

18 *Ordonnance n°58-1270 du 22.12.1958 portant loi organique relative au statut de la magistrature* [Act of Dec. 22, 1958 on the Status of the Magistracy] [hereinafter *Magistrates Status Act*], Art. 22.

19 *Magistrates Status Act*, Art. 25, Sec. 2 (1).

20 *Magistrates Status Act*, Art. 13.

21 *Magistrates Status Act*, Art. 29.

22 This can happen if there is an urgent need for additional support in another prosecution office. In practice, very few examples of this have arisen in the last 50 years. The Superior Council of the Magistracy would also strictly monitor such a decision to ensure that it is not, in fact, a concealed disciplinary measure.



either the city in which they serve or their field of activity—without their consent. In practice, prosecutors change their positions only if they wish to do so, and more generally when they request promotion.

Since 2002, a new rule applies to heads of courts and heads of prosecution offices: they are appointed for a term of seven years without the possibility of reappointment to the same position and the same city. This rule stems from the desire to improve the exchange of experience at the national level, and also to avoid bureaucratic habits.

When their mandate expires, District Prosecutors are automatically appointed to the prosecution service of the Appeals Court where they have been prosecutor at the local level; however, at the end of his or her seven-year term, the District Prosecutor may be appointed elsewhere, and in particular may be promoted to higher office.

At the end of their seven-year terms, Prosecutors General may be appointed to any position at their rank, though they are most often appointed to the Court of Cassation (Supreme Court). As explained above, members of the *Parquet* who are neither Prosecutors General nor District Prosecutors have no set term of office and are more likely to move due to promotional issues.

The *Parquet* may transfer individual prosecutors to different positions to ensure the proper functioning of the prosecution service as a whole.<sup>23</sup> Transfers, which happen in exceptional cases, are always decided upon by the Minister of Justice. In practice, this does not occur often, and prosecutors usually transfer at their own request. Prosecutors can also appeal involuntary transfers to the relevant administrative court, a process that helps ensure that transfer is not used as a form of hidden disciplinary measure.

*Other Protections:* While in office, prosecutors enjoy certain protections in regard to their professional conduct. A prosecutor is allowed to speak before the court according to the dictates of his own conscience, even if he has been given different instructions by his superiors; he is obliged to present the written instructions he has received to avoid disciplinary measures, but beyond that he may present his own views. Prosecutors consider this rule a very important defense of their professional autonomy.<sup>24</sup>

In addition to the normal rules in the Criminal Code ensuring physical integrity, magistrates also enjoy protection against threat and any kind of attack which may be directed against them in the exercise of their functions.<sup>25</sup> The state is responsible for compensating any harm inflicted directly, in all cases not otherwise covered by retirement legislation.

*Promotion:* Salary increases are not considered promotions, but rather administrative measures; promotions in rank come about through the three levels explained above (second rank, first rank and “*hors hiérarchie*”). Even within a given rank, appoint-

<sup>23</sup> This contrasts with judges, who are protected against involuntary transfers.

<sup>24</sup> Despite its importance to the profession, this rule is seldom explicitly referred to, in part because it is a particularly ancient rule, first elaborated several centuries ago.

<sup>25</sup> Magistrates Status Act, Art. 11.

ment as head of office (District Prosecutor or Prosecutor General) is also considered a promotion. The same promotion rules apply to prosecutors and judges. Rules of promotion do not apply to magistrates out of hierarchy (*hors hiérarchie*).<sup>26</sup> Transition to a higher rank is possible only after a magistrate has served a set period of time at the lower rank.<sup>27</sup> A magistrate must be put on a special list of promotions prepared by the Committee on Promotions.<sup>28</sup> That Committee is composed of the President of the Court of Cassation (acting as chairperson of the committee); the Prosecutor General at the Court of Cassation; the Chief Inspector of Judicial Services; two Magistrates from the Court of Cassation possessing the highest rank and elected by all magistrates out of hierarchy of the Court of Cassation; two presidents of Courts of Appeals and two Prosecutors General from the Courts of Appeals; and ten other magistrates. The Committee meets behind closed doors.

The list the Committee produces is submitted formally to the President of the Republic for signature.

With the exception of magistrates at the Court of Cassation, no magistrate may be promoted to the first level of service at a court in which he has served for more than five years.<sup>29</sup> Magistrates may not be promoted to the position of a District Prosecutor head of office at the court to which they are appointed.<sup>30</sup> These rules were established in order to encourage mobility within the country.

Magistrates passed over for promotion remain in the same position.

Promotions are effected by virtue of a Presidential decree. A decision for promotion is made at the recommendation of the Minister of Justice, following consultation with the SCM body concerned with prosecutors.<sup>31</sup> The Minister of Justice is not bound by the opinion of the SCM. As explained above, the SCM must be consulted before the appointment of any member of the *Parquet* at the same level or in the course of a promotion, except in regard to the appointment of a new Prosecutor General. The role of the promotion committee is only to prepare an annual list of magistrates eligible for promotion from the lowest to the highest rank due to their length of service and competence.

*Restrictions on Activities:* Prosecutors and judges have identical restrictions on their external activities and affiliations. The position of magistrate is incompatible with the following:<sup>32</sup> a position in the civil service; any professional or other remunerated activity;<sup>33</sup> national or European parliamentary office; representative office on the

26 Magistrates Status Act, Art. 39 (1).

27 *Décret n°93-21 du 7 janvier 1993 pris pour l'application de l'ordonnance n°58-1270 du 22.12.1958 portant loi organique relative au statut de la magistrature* [Council of Ministers Decree no. 93-21 of January 7, 1993 on the Implementation of the Magistrates Status Act] [hereinafter Decree on the Implementation of the Magistrates Status Act], Art. 12.

28 Magistrates Status Act, Art. 2. There is a single Committee for both prosecutors and judges.

29 Magistrates Status Act, Art. 2(2).

30 Magistrates Status Act, Art. 2(5).

31 On the SCM, see Section 4.1. below.

32 Magistrates Status Act, Art. 8.

33 Individual leave may be allowed, at the discretion of the court chairperson, if the activity does not

Economic and Social Council;<sup>34</sup> position as a Regional or Municipal Councilor; or service as a lawyer, notary public, bailiff, registrar at a commercial tribunal<sup>35</sup> or judicial administrator in the same area of the court in which they have served more than five years. Magistrates may be appointed ministerial counselors with the approval of the Minister of Justice and with the magistrate's own consent.<sup>36</sup>

Prosecutors are prohibited from taking part in political demonstrations or from expressing views against the republican form of government, or otherwise taking part in demonstrations incompatible with the obligations required of their position, or any form of activity that would hinder the normal operation of judicial bodies.<sup>37</sup> Magistrates are allowed to be members of trade union organizations, however.<sup>38</sup> There are several magistrates' trade unions that include both judges and members of the *Parquet* that work to protect and promote the general interests of the profession. Their respective influence can be measured when elections to the SCM and to the promotion committee take place; participation in these elections is usually high because of their importance to the magistracy's membership.

## 2.5. Individual accountability of prosecutors

*Evaluation:* The performance of each prosecutor is evaluated every two years,<sup>39</sup> in addition to evaluations for promotion. The performance of Prosecutors General is not subject to evaluation.<sup>40</sup>

Prosecutors General evaluate the work of prosecutors at the courts in their area and also evaluate the work of their own and the District Prosecutor's deputies. The District Prosecutor makes recommendations concerning his deputies to the Prosecutor General. The evaluation consists of a report drafted by the Prosecutor General, taking into account the information he holds himself or receives from the District Prosecutors. The evaluation contains a description of the position, accompanied by general comments concerning the prosecutor's performance and the possible need for additional training. The Minister of Justice receives a copy of the evaluation.

If a member of the *Parquet* disagrees with the evaluation, he can ask for a review of it by the Prosecutor General of a Court of Appeal. If his request is not granted, he can ap-

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undermine the dignity or independence of magistrates, or if it has a training purpose.

34 The Economic and Social Council is a consultative assembly composed of representatives of the main economic and social areas of activity, with which the Government is required to consult on certain issues; the Council may also act of its own accord on certain matters within its competence.

35 A judicial body composed of judges elected by merchants and competent to rule on disputes among merchants, as well as in cases concerning commercial transactions and corporate bankruptcy.

36 Council of Ministers Decree on the Implementation of the Magistrates Status Act, Art. 6.

37 Magistrates Status Act, Art. 10.

38 *Décret n°82-447 du 28.05.1982 relatif à l'exercice du droit syndical dans la fonction publique* [Decree Concerning the Right of Participation of Civil Servants in Trade Union Organization, May 28, 1982] [hereinafter Decree on Civil Servant Participation in Trade Unions].

39 Magistrates Status Act, Art. 12, (1).

40 Magistrates Status Act, Art. 39.

peal to the promotion committee. This happens in a limited number of cases each year.

*Disciplinary Procedures:* Prosecutors are subject to discipline for omissions in the discharge of official duties or breaches of the duty of honor, good standing and dignity. This applies both to their professional and private life; ethics rules have been established to ensure citizens' confidence in their prosecutors.<sup>41</sup> A prosecutor's position in the *Parquet's* hierarchy may also affect the assessment of his conduct. A Prosecutor General of a Court of Appeals may approach the Ministry of Justice with information concerning inappropriate conduct or misdemeanors by prosecutors.<sup>42</sup>

Disciplinary measures may include formal proceedings and sanctions or informal warnings. The Chief Inspector of Judicial Services, the Presidents of Courts, Prosecutors General and Heads of Directorates within the Ministry of Justice may issue a warning to any subordinate prosecutor. The Prosecutor General of a Court of Appeals may address such a warning to any member of the *Parquet* belonging to his Court of Appeals. The warning must be motivated; no definite guidelines have been established, but the Ministry of Justice disseminates information to heads of offices regarding sanctions to be imposed for breaches of discipline, in order to establish a common practice. A warning will be deleted from a prosecutor's official file after three years, provided no new warnings have been issued or formal disciplinary punishments imposed.<sup>43</sup>

The Minister of Justice conducts formal disciplinary proceedings against prosecutors.<sup>44</sup> Where grounds for the institution of disciplinary proceedings exist, the Minister of Justice must approach the Prosecutor General at the Court of Cassation as Chairman of the Superior Council of the Magistracy's prosecutorial panel. The Minister may, at the recommendation of higher-ranking Prosecutors and following consultations with the SCM, prohibit a prosecutor from discharging his duties until a final decision has been made.<sup>45</sup>

The competent panel for the *Parquet* is chaired by the Prosecutor General of the Court of Cassation. The panel holds meetings and hearings behind closed doors; the accused member of the *Parquet* can be assisted by a lawyer and has access to the file of evidence against him. After the sentence, an appeal is possible before the State Council.<sup>46</sup>

The Minister may not impose a disciplinary sanction without first consulting the Superior Council of the Magistracy's prosecutorial panel,<sup>47</sup> and if he intends to impose a more serious sanction than the Council, he must consult with the Council a second

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41 Magistrates Status Act, Art. 43.

42 Magistrates Status Act, Art. 63 (1-2).

43 Magistrates Status Act, Art. 44 (2).

44 In contrast, judges are disciplined by the Superior Council of the Magistracy.

45 Magistrates Status Act, Art. 58 (1). If the Superior Council of the Magistracy is not consulted within two months, however, the provisional ban is lifted. Magistrates Status Act, Art. 58 (2).

46 The State Council (*Conseil d'Etat*) is an administrative court in charge of judging any breach of administrative rules by executive or administrative authorities.

47 Magistrates Status Act, Art. 59.

time.<sup>48</sup> Apart from this, the decision of the SCM is not binding on the Minister. Most of the time, the Minister follows the advice of the SCM. The Truche Commission recommended that the Minister of Justice be required to submit all disciplinary proposals to the Council and be bound by the SCM's decision.<sup>49</sup> This proposal was based primarily on the belief that it is better to have two separate deciding and reviewing authorities. In practice, Ministers are very careful in their use of this disciplinary power.

Disciplinary sanctions include: reprimand recorded in the official file; reappointment or transfer; withdrawal of functions; demotion in rank; demotion in position; provisional suspension from office for one year with partial or full withdrawal of payment; early retirement; or removal from office with or without retirement pension.<sup>50</sup> Only one of these sanctions may be imposed on a prosecutor, even if he has committed multiple violations.<sup>51</sup> However, certain sanctions—withdrawal of functions, demotion in rank, provisional suspension from office for a term of one year with partial or full withdrawal of payment—may be combined with a reappointment or transfer.<sup>52</sup>

Disciplinary proceedings do not happen very often (less than 50 per year); heads of offices are, however, very careful to monitor wrongful conduct by prosecutors, as defined by the disciplinary code.

*Civil and Criminal Liability:* Prosecutors are subject to general civil liability for errors made in their professional capacity, although only for “personal omissions and errors.”<sup>53</sup> The state, however, “is obliged to repair damages caused by the improper functioning of the judicial system. Liability may be enforced only for the gravest errors or incidences of denial of justice”;<sup>54</sup> this includes harms committed by individual prosecutors in their professional capacity, and the state may enforce civil liability against prosecutors.

Magistrates have the same responsibilities and liabilities before the criminal law as ordinary citizens; they have no special immunity. However, prosecutors have civil and criminal immunity for their utterances in court.<sup>55</sup>

No code of ethics for prosecutors or for their administrative structures, including the Superior Council of the Magistracy, has ever been enacted, although in 2003 the Minister of Justice assembled a task force to consider this issue and make recommendations concerning the clarification and enactment of ethical rules in response to recent episodes involving prosecutors accused of fraud and internet child pornography.<sup>56</sup>

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48 Magistrates Status Act, Art. 66.

49 Report of the Truche Commission, *supra* note 12.

50 Magistrates Status Act, Art. 45.

51 Magistrates Status Act, Art. 46(1).

52 Magistrates Status Act, Art. 46 (2).

53 Magistrates Status Act, Art. 11, (1).

54 Judicial Organization Code, Art. L. 781, Sec. 1.

55 See Magistrates Status Act, Art. 5. The Judicial Organization Code specifies that “the *Parquet* is free to give opinions that it considers appropriate for the proper administration of justice.” In this respect, prosecutors enjoy greater immunity than judges.

56 The task force was chaired by President Jean Cabanne, a former official at the Court of Cassation.

The Superior Council of the Magistracy considers itself responsible for ongoing review of prosecutors' ethical behavior, as it has access to magistrates' files in the appointments process and in disciplinary proceedings; however, it has no formal mandate to implement a code of ethics.

## 2.6. Training

Prospective prosecutors and judges train at the National School of the Magistracy ("*Ecole Nationale de la Magistrature*").<sup>57</sup> Students are called "judicial auditors" (*auditeurs de justice*) and are considered part of the judicial body.<sup>58</sup> Judicial auditors already take an oath to serve justice and to keep confidential the information they receive; they are paid and are involved in the various activities of the prosecution service and of the Courts; and they are subject to all kinds of liability.

Students are admitted to the limited number of available positions based on a competition or through direct selection by the Minister of Justice.<sup>59</sup>

The competition consists of a written and an oral examination, and candidates<sup>60</sup> are graded separately in one of three categories based on age and experience.<sup>61</sup> The Minister of Justice may also directly appoint students with certain professional or legal experience to the School of the Magistracy on the basis of a binding recommendation by the promotion committee.<sup>62</sup>

Training at the School of the Magistracy takes two years. During training, judicial auditors have internships in their area of specialization. Supervised by magistrates, interns take part in judicial activities, but have no delegated powers. Thus they can assist examining magistrates; assist prosecutors in various actions in criminal proceedings; participate in judicial deliberations (with a consultative vote) in civil and correctional courts (dealing with serious offenses other than felonies); and participate in deliberations of the Criminal Court.<sup>63</sup>

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57 The School also trains magistrates from other countries with which France has entered Agreements for Cooperation in the Field of Justice (*Accord de coopération en matière de Justice*).

58 Magistrates Status Act.

59 Magistrates Status Act, Art 15.

60 All applicants must have French nationality, a higher education degree, have completed their military service, and be in good physical condition. Magistrates Status Act, Art. 16.

61 The three categories are: candidates under age 27 with a degree from an institute of higher education; civil servants below age 40; and candidates aged 40 or above with at least eight years' professional experience with a territorial administrative body or other professional legal experience.

62 Three categories are eligible for direct ministerial appointment: individuals aged between 27 and 40 years old who, beside meeting general eligibility requirements for the competition, also have four years of professional experience in the legal, economic or social fields; individuals holding a doctoral degree in legal studies and another diploma in higher education; and individuals with a degree in legal studies who have been conducting research in the area of law within a higher education institution for at least three years. Magistrates Status Act, Art. 18-I.

63 Magistrates Status Act, Art. 19.

At the end of their training, judicial auditors are examined by an independent jury, on the basis of which the examining panel prepares a binding list of nominations for specific positions, which is presented to the Minister of Justice for publication.

The School of the Magistracy also offers optional ongoing training for magistrates. Such training is provided in the form of seminars, internships, meetings, and discussions. These trainings are well-attended by prosecutors, who appreciate their quality and diversity, especially if they are hoping to specialize more deeply or to change positions.

The School of the Magistracy is autonomously administered under the supervision of the Ministry of Justice, which allocates its budget.

The School of the Magistracy has wide autonomy in organizing its trainings, guaranteed by the President of the Court of Cassation, who chairs the administrative board.

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### III. Functions and Powers of Prosecutors

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#### 3.1. Prosecutorial functions in criminal justice

The *Parquet* institutes criminal proceedings and monitors the application of the law.<sup>64</sup> It is competent in respect to all offenses and violations of the criminal law and crimes committed by the President or members of the Government;<sup>65</sup> specialized prosecutors deal with military offenses judged by military court in times of peace as well as in wartime. In all other respects, the *Parquet* has a monopoly over the institution of criminal proceedings.<sup>66</sup>

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64 Criminal Procedure Code, Art. 31.

65 These are tried by courts established for this purpose: the High Court of Justice (*Haute Cour de justice*) for the President and the Court of Justice of the Republic (*Cour de justice de la République*) for members of the government.

66 The possibility of a victim appearing before the examining magistrate or the court as a civil party to press a claim for damages is often seen as an exception to the *Parquet's* monopoly over criminal proceedings. See Frédéric Debove and François Falletti, *Droit Pénal et Procédure Pénale* (2006). It is true that a civil claim may be filed at any time and may accompany criminal proceedings instituted by the Prosecutor, Criminal Procedure Code, Art. 85. The civil party is empowered to require the examining magistrate to take certain actions, exhaustively listed by the law: to interview and hear the civil party, hear witnesses, and convene all parties and witnesses in the case to be heard together by the examining magistrate. This, however, does not actually constitute an independent authority to initiate prosecutions, and in any event it in no way limits the *Parquet's* scope for independent action, since the conduct of the civil party is not binding on the prosecution. See Lemesle and Pansier, *supra* note 14, at 48.



The *Parquet* receives complaints and information of specific offenses and decides what action needs to be taken.<sup>67</sup> Prior to making a decision whether to prosecute or not, the *Parquet* is obliged to collect the necessary evidence that a crime has been committed and its perpetrator is known.

Investigative actions are taken by prosecutors or by examining magistrates, depending on the nature and gravity of the offense.<sup>68</sup> Examining magistrates do not always take part in investigative action, since their participation is only mandatory in the investigation of more serious crimes, whereas with regard to less serious offenses they will only intervene upon express request of the prosecution office. Both institutions are entitled to give instructions to the judicial police in the course of investigation. In practice, a large part of the investigation is often delegated to the judicial police; however, the police must keep the prosecutor or the examining magistrate informed of the ongoing investigations, especially if arrests are needed, and make a detailed report to them at the end of the inquiries. The targets of investigation are determined by the magistrates, who must review the results and determine the schedule of those investigations.

*Discretion to Initiate Prosecution:* Regardless of which body supervises the initial investigation, however, it is the *Parquet* that decides whether or not to prosecute, unless an examining magistrate is in charge of the case (in that case, the prosecutor only offers his own opinion when the examining magistrate must decide whether or not to send the case to a court for judgment). In deciding, prosecutors employ the principle of discretionary prosecution (*principe d'opportunité des poursuites*). This was part of a conscious attempt by Parliament to give prosecutors discretion to select cases, acknowledging that, in practice, it is not possible to prosecute every offense.<sup>69</sup> The discretionary principle allows the *Parquet* to terminate criminal proceedings “without further effect” (*classement sans suite*), largely at its own discretion; the criminal courts are prohibited from criticizing the *Parquet's* decisions about whether or not to institute criminal proceedings in a given case.<sup>70</sup>

Approximately one-third of all investigations are terminated “without further effect.”<sup>71</sup> This includes cases in which no offender was ever identified, the judicial police initially pursued investigation that was then dropped because of insufficient evidence, or other courses of action were pursued (mediation, compensation to the victim, warning), as well as complaints involving conduct that does not constitute a criminal offense or for which the statute of limitations has expired.<sup>72</sup>

67 Criminal Procedure Code, Art. 40.

68 French criminal law distinguishes among three grades of criminal offenses: crimes (*crimes*), offenses (*délits*), and petty offenses (*contraventions*).

69 See Report of the Truche Commission, *supra* note 12.

70 Judgment of the Court of Cassation, May 21, 1979. See also Judgment of the Court of Cassation Court, September 21, 1993 (finding that the discretionary principle does not violate the European Convention on Human Rights, Art. 6).

71 “*Les chiffres-clés de la justice*,” statistical information on the website of the French Ministry of Justice, available at [www.justice.gouv.fr](http://www.justice.gouv.fr).

72 Lemesle and Pansier, *supra* note 14, at 65-66.

There are only limited means to compel a prosecution if the responsible prosecutor is unwilling. A victim dissatisfied with a prosecutor's decision to terminate proceedings can file an appeal with the Prosecutor General of the Court of Appeals, who may issue a written instruction to prosecute to the relevant District Prosecutor. In addition, one of the main guarantees against arbitrary decisions is the ability of victims to request an examining magistrate to conduct an investigation into the case. An important percentage of cases submitted to examining magistrates are the result of such requests by victims (often cases of fraud related to commercial interests or those involving private issues). In such a situation, the examining magistrate must consider whether any criminal offense exists, even if the prosecutor previously dropped the case. This is a very strong guarantee against prosecutors' abuse of discretion. At the end of the investigation, the examining magistrate decides whether the case will go to trial and the victim will be authorized to attend the trial to request civil compensation.

The *Parquet's* application of the discretionary principle has been systematized in recent years in order to ensure transparency; statistical forms are now filled out by head prosecutors to identify the different situations in which it has been implemented and methods that have been used.

*Control of Ongoing Proceedings:* During court proceedings, the *Parquet* plays a central role. It can call witnesses and experts to testify, and is allowed to ask questions of the defendant, witnesses and experts taking part in the hearing. The prosecution "must be heard,"<sup>73</sup> and any judgment that does not register the presence of the *Parquet* must be overturned.<sup>74</sup> The prosecutor is also allowed to make formal requests and representations to the court regarding sentencing.

*Post-Sentencing:* The *Parquet* retains certain powers even after sentence has been imposed. It monitors the enforcement of judgments<sup>75</sup> and sentences, and can summon the assistance of law enforcement bodies (*la Force Publique*)<sup>76</sup> to this effect. The prosecutor has the authority to ask the police to search for sentenced persons and to review their arrest before they are jailed. He also forwards necessary information to the treasury in case a fine is to be recovered. The *Parquet* enforces the sentences imposed by the competent judge where such sentences involve, for example, community service orders or expulsion from France. The *Parquet* has no authority to enforce judgments of a civil, financial, or customs nature, however. In addition, the institution of a special judgeship for the enforcement of sentences<sup>77</sup> has tended to reduce the involvement of the *Parquet* in enforcement issues: administrative boards work more and more directly under the supervision of such specialized judges in order to enforce the sentences imposed by the criminal courts. This has been a significant change.

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73 Judgment of the Court of Cassation, July 8, 1972.

74 Judgment of the Court of Cassation, February 14, 1991.

75 Judicial Organization Code, Art. 32.

76 Police and Army officers placed at the disposal of the government; their role mainly consists in the maintenance of public order, the observance of the law, and enforcement of judgments.

77 This is a judge with the first instance court, with a term of office of three years, subject to renewal.

The *Parquet* (and other institutions) can suspend certain sentences of less than three months of its own accord, and can propose to the court the suspension of sentences longer than three months.<sup>78</sup>

### 3.2. Relationship with the judge at the pre-trial stage

A prosecutor may order detention of a suspect for 24 or 48 hours at his own discretion; longer periods of detention require a decision by a judge for certain classes of cases.<sup>79</sup> Similarly, a judge's approval is required for bail or use of electronic monitoring devices for suspects. Decisions may be immediately appealed to the Court of Appeals for expedited review.

Prosecutors can order searches and seizures only pursuant to court order, apart from emergency needs in case of a manifest offense (*flagrant délit*),<sup>80</sup> and such actions are governed by rules protecting privacy. Information or evidence acquired in contravention of such rules is not normally admissible at trial. As an officer responsible for overseeing the application of the law, a prosecutor may review the investigative methods used to acquire evidence.

As noted, at the end of the pre-trial period, the prosecutor decides whether or not to bring a case before the court. When an examining magistrate has been designated, as is the practice for more serious cases (*affaires sérieuses et complexes*), that magistrate alone has the power to decide to take the case to trial. However, in such situations, the prosecutor must be asked for his opinion before the examining judge comes to a decision. The court must then decide whether or not to convict, taking account of the evidence gathered in the examining magistrate's dossier.

### 3.3. Powers outside the criminal justice system

The *Parquet* also takes part in civil and commercial proceedings, and maintains cooperative relationships with local and administrative authorities on matters of public order.

In civil proceedings,<sup>81</sup> the *Parquet* acts in cases set forth by law<sup>82</sup> (for instance regarding civil status, adoption, and nationality) and may intervene in cases it considers of concern to public order. The *Parquet* must be informed of cases concerning adoption, custody of minors, or the institution of guardianships in respect of young persons

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78 Criminal Procedure Code, Art. 708.

79 Such classes of cases include those involving organized crime or terrorism.

80 A "*flagrant délit*" occurs when a crime or an offense has just been committed. In such cases, the police have increased power to arrest suspects or conduct searches, under strict supervision by the prosecutor, within the framework of the law.

81 *Code de procédure Civile* [Civil Procedure Code], Division XIII (governing the work of the *Parquet*).

82 Judicial Organization Code, Art. L. 751-2.

and adults. A special prosecutor dealing with cases involving children and young persons is assigned to the Court of Appeals by each Prosecutor General of the Court of Appeals from among his deputies. The *Parquet* also takes part in certain special proceedings concerning the nationality of individuals, their civil status, adoptions, and parental authority. The civil unit in each prosecution office can initiate proceedings or offer legal opinions to the civil courts, speaking on behalf of the general interest of society, in order to avoid leaving the issue purely to private interests.<sup>83</sup>

In commercial law, the prosecution must be informed of, and may take part in, proceedings for bankruptcy, violations by corporations, business rehabilitation or liquidation. This can occur especially when commercial problems might lead to losses to victims.

The *Parquet* is not in charge of administrative proceedings dealt with by special courts, but prosecutors work with administrative agencies and the local heads of administrative authorities, or prefects (*Préfet*),<sup>84</sup> to ensure coordination on matters relating to public order for which both have responsibility.<sup>85</sup> Prosecutors also commonly maintain contacts with local elected officials, such as mayors or presidents of *regions*, to inform them about the justice system and its actions in their areas.

The *Parquet* initiates and prosecutes disciplinary proceedings against professionals involved in the functioning of the justice system, including civil servants, lawyers, notaries, and experts. A prosecutor can initiate and appeal proceedings before the relevant disciplinary organ. Prosecutors also monitor such officials' management and their use of public money.

The prosecution service may also send requests to judicial authorities abroad. Within the European Union, these requests are sent directly from one prosecution office to another abroad, not via the Ministry of Justice or the Ministry of Foreign Affairs. The prosecutor must also implement requests for extradition or European arrest warrants.

The European Union has set up a new body called Eurojust, to which each of the 25 member states send prosecutors to represent their judicial authorities, in order to facilitate and coordinate mutual legal assistance through the European region.

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83 When it deals with issues such as racism or other discrimination, the prosecutor does not act under civil law, but in accordance with criminal law. It is up to administrative bodies to prevent or detect such attitudes when they do not clearly fall under the criminal law.

84 A prefect is a civil servant within the Ministry of Interior appointed by presidential decree, following nomination by the Prime Minister and the Minister of the Interior.

85 See also Section 4.4 below.

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## IV. Relationship of the Prosecution Office to Other Organs of the State

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### 4.1. The constitutional location of the prosecution service

The French Republic is a mixed presidential and parliamentary democracy following the classical separation of powers model; the Constitution is the supreme and defining law.<sup>86</sup>

The legislative authority is bicameral, consisting of a National Assembly elected by district majority and a Senate indirectly elected by an electoral college. Parliament has the authority to adopt bills and oversee government policy, for instance through oral and written questions. The national assembly also has the power to throw the government out of office.

Executive power is exercised by both the President, who is head of state, and the government. The President is directly elected and enjoys certain personal powers that he exercises on his own authority, as well as other powers jointly exercised with the government, headed by the Prime Minister. The government administers national policy and allocates funds and resources;<sup>87</sup> it is formed by the Prime Minister (who is appointed by the President) on the basis of recommendations from any citizen or Member of Parliament. The government is answerable to the National Assembly.

Judicial authority is vested in courts dealing with civil, commercial, and criminal cases and specialized administrative courts dealing with cases involving state liability; specialized courts at the national level also examine penal claims against the President and members of the government. Appeals variously terminate in the Constitutional Court, the Court of Cassation, or the quasi-judicial State Council.<sup>88</sup> The Superior Council of the Magistracy—chaired by the President of the Republic and including senior legislators, members of the government, and members of the Council of State—administers the career paths of the magistracy, which includes both judges and prosecutors.<sup>89</sup>

The hierarchical structure of the *Parquet*, its subordination to the Minister of Justice, the procedure for appointment of prosecutors, and the disciplinary rules could lead

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86 *Constitution de la République française du 04 octobre 1958* [Constitution of the French Republic of October 4, 1958] [hereinafter Constitution], October 4, 1958.

87 Constitution, Art. 20.

88 See *supra* note 46.

89 Both judges and prosecutors are considered magistrates (*magistrats*). However, judges are identified as “bench magistrates” (*magistrats du siège*), while prosecutors are called “floor magistrates” (*magistrats du Parquet*).

to the conclusion that the *Parquet* is “attached” to the executive.<sup>90</sup> However, there is no doubt that the *Parquet* belongs to the judiciary. The Constitutional Court has frequently emphasized that prosecutors have special powers to protect human rights, individual freedoms, and property, which in turn requires that prosecutors possess important guarantees of independence in their decision-making and career paths. Those guarantees are also strongly linked to the existence of the Superior Council of the Magistracy.

*The Superior Council of the Magistracy:* A single body, the Superior Council of the Magistracy, has a say in the careers of judges and prosecutors. The SCM has power in the appointment, disciplining, and dismissal of magistrates.

The SCM’s membership is mixed and includes prosecutors, judges, and political appointees. The SCM consists of the President of the Republic, who acts as Chairman; the Minister of Justice, who acts as the Deputy Chairman *ex lege*;<sup>91</sup> a member of the State Council; three members appointed by the President of the Republic and the Presidents of the National Assembly and Senate respectively, and who may not “belong either to Parliament or the magistracy”;<sup>92</sup> and professional judges and prosecutors elected by their colleagues at different levels of the hierarchy.<sup>93</sup> Appointed or elected members serve four-year terms with no right of “immediate” re-election.<sup>94</sup> During their term in office, SCM members may not be promoted and their position may not be changed.

The SCM has two separate panels, one for administering judges and the other for prosecutors. Each panel includes a greater number of members from the part of the magistracy that it regulates; thus the prosecutors’ panel has five members elected by prosecutors and only one judge; the judges’ panel similarly has five members elected by judges and only one prosecutor. However, the President of the Republic, the Minister of Justice, a member of the State Council and the three members appointed by the President of the Republic and the Presidents of the National Assembly and the Senate are members of both panels.

## 4.2. Relations with the legislature

Parliament does not exercise any direct control over the *Parquet* or the magistracy as a whole. Parliament does not participate in the appointment and dismissal of prosecutors. The *Parquet* is not answerable to Parliament for its operations; instead, the Minister of Justice acts as the representative of the magistracy in dealings with Parliament.

<sup>90</sup> See, e.g., Lemesle and Pansier, *supra* note 14, at 42.

<sup>91</sup> Constitution, Art. 65. The Minister chairs the SCM when it sits as a disciplinary body.

<sup>92</sup> Constitution, Art. 65 (3).

<sup>93</sup> First-level magistrates, Presidents and Prosecutors of Courts, heads of Courts of Appeal, and representatives of the Court of Cassation each elect representatives to the SCM.

<sup>94</sup> *Loi organique n°94-100 du 5 février 1994 sur le Conseil supérieur de la magistrature* [Superior Council of the Magistracy Act of February 5, 1994] [hereinafter Superior Council of the Magistracy Act], Art. 6 (1).

The Minister of Justice informs Parliament about the work of the magistracy and acts as an interlocutor and advocate for judges and prosecutors. The Prosecutor attached to the Court of Cassation is empowered to draw the attention of the Minister of Justice to improvements that could contribute to the resolution of difficulties identified in the implementation of the law and make suggestions for reforms. It must be noted that any Prosecutor General of the Court of Appeals may be consulted by the Ministry of Justice about problems with the practical implementation of laws. In addition, the Court of Cassation publishes an annual report that is a reference for practitioners and lawmakers. All suggestions from practitioners are useful at the legislative level.

The Minister of Justice may give general information to Parliament, especially during the budgetary discussions; if a member of Parliament asks a question about an individual case by request, however, the Minister of Justice is not allowed to give information that would violate rules protecting the confidentiality of the investigation. Parliament may conduct independent investigations relating to the organization and the general work of the prosecution service, but never about individual cases or prosecutors.

Parliamentary committees may also hear magistrates directly, but may not solicit information about individual cases; during such hearings, magistrates appear as experts to give general information, especially when new bills are under consideration.

Parliament can influence the *Parquet* through legislation, and in particular through the budgetary process. Parliament is informed of the results of the activities of the judicial system, including the Prosecution Service, and can support new good practices with financial subsidies. Parliament adopts a single budget for the entire magistracy; the Ministry of Justice proposes a budget, including the needs of the Prosecution Service, after gathering the requests of each court and mediating among them. The general budget has greatly increased in recent years; since the budget for justice in France is considered low in comparison to other countries, there has been a strong trend to increase it and to provide more money to support the activities of the judicial system, including the prosecution office.

Parliament may not impeach prosecutors.

#### 4.3. Relations with the executive

The various elements of the Ministry of Justice have regular links to the policy, personnel, and work of the *Parquet*.

The Minister of Justice proposes the *Parquet's* budget to Parliament, and the Ministry administers and distributes funds allocated to the magistracy. This power is intended only to improve general functioning, without interference in specific cases.

*Executive Influence on Prosecutorial Career Path:* The President appoints prosecutors and their deputies by decree to every level of the courts, at the recommendation of the Minister of Justice. The SCM gives an opinion on these nominations, but



the Minister of Justice (who also sits on the SCM) is not bound by it;<sup>95</sup> in practice, however, the Minister almost always follows the recommendation of the SCM. Each Prosecutor General of the Court of Appeals is himself appointed from among prosecutors or judges and thus belongs to the magistrates' body. Prosecutors General of the Courts of Appeals are appointed by presidential decree at the advice of the Council of Ministers of the government, without consultation with the Superior Council of the Magistracy.<sup>96</sup>

In recent years there has been discussion about reforming the procedure for appointment of prosecutors and Prosecutors General of the Courts of Appeals, but no reform has yet taken place. Concern remains about possible political influence on the process, although it was much improved by the constitutional reforms of 1994; on the other hand, there is some hesitation about having a prosecution office completely separate from the general interests for which the government is responsible. The most frequent criticism focuses on the control the executive exercises over the appointment of the Prosecutor General of Court of Appeals and the prosecutors. Some would like to see the Prosecutor General of the Court of Appeals and all prosecutors appointed on the basis of a binding recommendation by the SCM, or even through its nomination. Such a reform would bring the rules of appointment of prosecutors into line with those for judges. The existing procedure for appointment of Prosecutors General—that is, without the involvement of the SCM—is usually defended by the need for more efficient enforcement of the policy priorities set by the government in the area of criminal law.

The Ministry of Justice plays an important role in the promotion of prosecutors. The Ministry of Justice issues recommendations for appointment to specific positions; these recommendations are then disseminated to any member of the prosecution service for observations and comments. SCM's prosecutors' panel then considers each nominee, along with any comments from members of the *Parquet*, and may give a negative advisory opinion to the Minister of Justice. However, the Minister is not bound by the Council's opinion, although he generally follows the advice of the SCM. The President of the Republic decides among the recommendations made by the Minister of Justice.

The Minister of Justice decides matters of prosecutorial discipline, based on recommendations by the SCM. The Minister may reconvene the SCM to consider additional sanctions if he considers its original recommendations insufficient.<sup>97</sup> In general, the Minister follows the recommendations of the Disciplinary Council of the SCM.

*Executive Instruction of Prosecutors:* The Minister of Justice can instruct the Prosecutor General of a Court of Appeals in writing to institute or reopen proceedings concerning any offense;<sup>98</sup> however, the Minister cannot order proceedings to be dropped

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95 By contrast, the Superior Council of the Magistracy also provides an opinion on the appointment of judges. In such cases, judges may only be appointed if the Council approves the nominations by the Minister of Justice; otherwise, the Minister is obligated to make new nominations.

96 Magistrates Status Act, Art 59.

97 Magistrates Status Act, Art. 48.

98 "The Minister of Justice can inform the Prosecutor General of the Court of Appeals of any offense

or dictate the particular course of a specific investigation.<sup>99</sup> Ministerial instructions to open an investigation must be in writing, and must be placed in the case file open to all parties, in order to increase the transparency of relations between the *Parquet* and the Ministry.<sup>100</sup> Instructions, recommendations, direct or indirect pressure and decisions based on personal relations, animosity, and economic or political interests that could lead to a failure to prosecute any specific case are also prohibited.<sup>101</sup> Such instructions do not occur in practice, but the establishment of such rules is important to prevent possible abuses. The requirement that instructions be in writing was added to the law in 1993 in response to concerns that the *Parquet* was too dependent on the executive.

The Minister of Justice may also intervene in prosecutorial decision-making by issuing circulars,<sup>102</sup> instructions of a general nature not related to any specific case; these circulars give guidance to the heads of general prosecution offices, who may nonetheless also take into account the circumstances and context in their own areas.

The Ministry of Justice holds frequent conferences with the *Parquet*, and the *Parquet* regularly provides information to the Ministry of Justice Directorate in charge of criminal cases (*Directeur des affaires criminelles et des grâces*) about cases that have attracted the interest of the media; the Ministry uses these information sources in drafting its instructions and circulars.<sup>103</sup>

The scope of laws covering offenses involving the economic and social fields has been broadened over the last thirty years; this has given rise to increasing links between the Ministry of Justice and other executive departments on matters of interest to the *Parquet*, as well as direct contacts between the *Parquet* and other agencies charged with enforcing the law. Links now exist on a regular basis with agencies in charge of customs, competition rules, labor, and health.

*The Truche Report on Reform:* In 1997, the President of the Republic asked a group of experts known as the Truche Commission to develop recommendations on reforming the relationship between the executive and the *Parquet*. The Commission first noted that the intervention of the executive, especially the Minister of Justice, in the operations of the *Parquet* through the use of instructions had created a sense of “attachment” and dependency of the *Parquet* on the executive.

In response, the Commission proposed several reforms. As regards the appointment of magistrates of the *Parquet*, it recommended that the opinion of the Superior Council of the Magistracy be binding on the Minister of Justice, since practice has

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he has become aware of and give instructions in writing for the institution of proceedings or for referral to competent bodies.” Criminal Procedure Code, Art. 36.

99 Debove and Falletti, *supra* note 10.

100 See Lemesle and Pansier, *supra* note 14, at 35.

101 Report of the Truche Commission, *supra* note 12, Chapter I, I-3.3 *Government Intervention in Individual Cases*.

102 Circulars are instructions in writing, which may be issued either by individual Ministers or by administrative bodies. Their purpose is to clarify a specific legal provision and provide guidance on its application. Circulars have no binding force.

103 See Lemesle and Pansier, *supra* note 14, at 36.

shown that almost without exception, he follows the recommendations of the Council in any event, and codifying this rule would simply entrench existing practice.<sup>104</sup> Similarly, the Commission recommended that the Minister of Justice be prohibited from ordering the initiation of proceedings or giving instructions to magistrates in specific cases.<sup>105</sup> In general, it recommended a more transparent relationship between the executive and the *Parquet*. The Commission did not recommend severing the relationship between the Minister of Justice and *Parquet* altogether, however; for example, it proposed allowing the Minister to reopen proceedings that have been closed by prosecutors.<sup>106</sup>

Lastly, the Commission recommended that the Ministry of Justice be required to adopt a “criminal prosecution policy” (*politique d’action publique*), reasoning that a uniform law enforcement policy would allow uniform application of the law by all prosecution offices.<sup>107</sup> This would prevent differing prosecutions of similar crimes depending solely on where the offense took place. The Commission noted that, in the absence of coordinated policy, there is a risk of arbitrariness and a real risk that each judicial body will carry out a policy of its own. Such a coordinated policy would be implemented in the form of law enforcement guidelines of a general nature and instructions relating to specific cases; Prosecutors General of Courts of Appeals and office heads would then implement the national priorities in their respective regions, and prosecutors would be required to provide full details of their operations to the Minister of Justice in periodic reports and individual reports on important cases.<sup>108</sup> If a District Prosecutor developed new practices, they would have to be clearly explained and in harmony with national and regional guidelines. Guidelines could address offenses committed by drivers and drug addicts, as well as actions taken against organized crime and terrorism. They could also establish a common policy on counterfeiting that could involve individual practices as well as organized trafficking. Uniform policy could also be implemented through more temporary instructions, for example in case of offenses linked to demonstrations.

Some of the Truche Commission’s recommendations were enacted into law in March 2004; they clarify the relationship within the hierarchy of the *Parquet* by allowing the Minister of Justice, Prosecutors General, and District Prosecutors to issue general circulars to establish general guidelines expressing national, regional and local priorities. This clarifies current practice and gives it legislative support. Thus, for example, special activity reports are now drafted every year by each prosecution office at the local and regional level. These reports are useful to the Ministry in providing information to Parliament and the public. They are also a good way of assessing the effectiveness of the guidelines, especially with the support of statistics and other data.

104 Report of the Truche Commission, *supra* note 12, Chapter I, I-3.7 *Superior Council of the Magistracy*.

105 *Id.* See also Criminal Procedure Code, Art. 30.

106 Report of the Truche Commission, *supra* note 12, Chapter I, I-3.3 *Government Intervention in Individual Cases*.

107 *Id.*

108 *Id.*, Chapter I, I-3.2 *Criminal Prosecution Policy*.

Some of the Truche Commission's recommendations have not been followed, however, such as giving the Superior Council of the Magistracy the power to issue binding opinions to the Minister of Justice. It was thought that this might create an imbalance of power between the Minister and the Council.

In addition, the 2004 law does not modify the basic hierarchal structure of the *Parquet*. Recent reforms seem to have favored greater transparency and clarification of the hierarchical nature of the *Parquet*.

#### **4.4. Relations with the police and with investigative organs other than the police**

The *Parquet* has functional administrative authority over special police forces that conduct criminal investigation, called the judicial police.<sup>109</sup> The main aims of the judicial police are to detect offenses, collect evidence, arrest offenders and commit them to court. Those aims are different from those of the administrative police, which are to protect the public order, or prevention, which is in the hands of various administrative authorities charged with general responsibilities (such as the *Préfet*) or more specific tasks (regarding health or labor).

The judicial police are administratively part of either the National Police, under the Ministry of the Interior, or the Gendarmerie, part of the Ministry of Defense,<sup>110</sup> but they are functionally separate from the administrative police. The judicial police are organized in a centralized, hierarchical fashion, with both functional units—dealing with organized crime or terrorism, for example—and territorial units attached to the National Police or to the Gendarmerie at the regional and local level.

Interaction between the *Parquet* and the judicial police occurs on several levels, relating to investigation and administrative supervision. All police officers are appointed by administrative decree;<sup>111</sup> to become a judicial police officer, however, an officer must obtain an additional authorization from the relevant Prosecutor General. Such an authorization is valid as long as the officer is involved in judicial police work, and can be revoked by the Prosecutor General in case of abuse. A judicial police officers' career path is determined by the respective Ministry, not the *Parquet*. However, Prosecutors General maintain a separate file on each judicial police officer and take part in the evaluation of judicial police officers' performance, which affects officers' promotion prospects.

Judicial police officers remain administratively part of the police forces, but when they are engaged in a judicial inquiry they are subject to the authority of the District Prosecutor or of the examining magistrate in charge of the case; they must obey

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109 The judicial police are composed of civil servants authorized to conduct investigations under the direction of the prosecutor or of the examining magistrate.

110 The National Police work mainly in cities and towns, while the Gendarmerie works mainly outside urban areas.

111 Criminal Procedure Code, Art. 16.

the magistrate's orders and supply him with all relevant information. The judicial police act "under the direction of the District Prosecutors" and "on the territory of each Court of Appeals, they act under the supervision of the Prosecutor General of the Court of Appeals and the control of the Investigative Chamber (*Chambre de l'instruction*)"<sup>112</sup> at the Court of Appeals."<sup>113</sup>

Prosecutors and examining magistrates each supervise the judicial police, depending on the type of investigation. Examining magistrates supervise in investigations of serious offenses (*délits graves*), while prosecutors supervise their work on investigations of manifest offenses (*flagrant délit*) and preliminary investigation (*enquête préliminaire*). The prosecutor and examining magistrate "enjoy discretion in the selection of the judicial police unit" that carries out an investigation.<sup>114</sup> The Prosecutor may also name another judicial police unit if he considers it necessary. There are different kinds of judicial police units on the national, regional, and local levels; some of these units specialize, for instance, in economic offenses, computer crime, or drug trafficking. This is why it may seem opportune to the prosecutor to choose the most efficient unit to deal with each specific case. Often a prosecutor (or an examining magistrate) delegates a large number of investigative actions to the judicial police by virtue of letters rogatory (*commissions rogatoires*), thus allowing them to conduct investigative actions without undue delay, but also in practice conferring significant power on them; nonetheless, the prosecutor or the examining judge retains control over the investigation, both to ensure that the laws are fully respected and to provide directives.

Prosecutors may oblige the judicial police to collect any and all information that in their view is necessary for the proper administration of justice. The judicial police are obliged to notify the prosecutor of the course of the investigation; under exceptional circumstances, the Prosecution Office may itself take over the investigation. Depending on the nature of the investigation, the powers of the judicial police may vary. In the event of a manifest offense, judicial police officers may proceed with the investigation on their own initiative, but must immediately notify the prosecutor; upon the prosecutor's arrival at the scene, the judicial police must hand over control of the investigation to the prosecutor, who may of course also give instructions to the judicial police officers.<sup>115</sup> In all other cases, called preliminary investigations, the judicial police operate on their own initiative, but with lesser powers, or on the instructions of the prosecutor. Judicial police officers must inform prosecutors of serious crimes "as soon as possible";<sup>116</sup> for less serious offenses, officers may conduct some investigations before reporting. When an arrest occurs, however, the relevant prosecutor must be informed "at the very beginning."<sup>117</sup> This requirement of early notification means that prosecutors can monitor and control all significant stages of investigation; in practice, however, this also gives the judicial police considerable latitude to determine the disposition of less serious cases. For such smaller cases, the judicial police

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112 The Investigative Chamber is a chamber of the Court of Appeals that hears appeals from decisions of the examining magistrate. Criminal Procedure Act, June 15, 2000.

113 Criminal Procedure Code, Art. 12 et seq.

114 Criminal Procedure Code, Art. D2 (3).

115 Criminal Procedure Code, Art. 41 (5).

116 Criminal Procedure Code, Art. 19.

117 Criminal Procedure Code, Art. 41, 63 and 77.

officer sends a report to the relevant prosecution office, the only one able to decide to prosecute or not; he may also require further investigation.

*Relations with the Regular Police:* The *Parquet* has the authority to monitor the treatment of arrested persons in custody (*garde à vue*, applied to arrested persons for a period of 48 hours maximum in the course of investigations). Prosecutors may visit judicial police stations holding arrested persons, and have certain powers to supervise their treatment; the judicial police are required to keep the prosecutor informed of the situation of any individual arrested. Prosecutors are supposed to visit the jails of judicial police stations in their area of operations at least once every year, and may visit at any time at their discretion; they maintain a register of their visits.<sup>118</sup> Even if this is a difficult task, prosecutors are strongly encouraged to do it by their hierarchy, and must provide an assessment of it.

Prosecutors can summon special law enforcement bodies (*la Force Publique*)<sup>119</sup> to enforce judgments and sentences. They can also organize systematic checks in some areas at specific times to combat specific offenses (such as drug dealing or traffic offenses).

Prefects<sup>120</sup> are responsible for maintaining public order, security, and the enjoyment of property, as well as ensuring observance of the law and enjoyment of civic freedoms. There is a prefect in each of the 100 local districts (*départements*) of France. Because prosecutors administer the operations of the judicial police, they have certain functions that overlap with the crime prevention and security responsibilities of prefects. Prefects and prosecutors in each district hold regular meetings to check the evolution of crime patterns in the area, regarding criminality in general or specific crimes; there can be specialized committees (for example, on traffic offenses or the situation of illegal immigrants) to coordinate preventive and administrative actions and judicial police targets.

There are structures at the local, regional, and national levels to elaborate and coordinate administrative and judicial policies. However, such coordination cannot place the *Parquet* under administrative direction or control, or limit its ability to conduct investigations and prosecutions in any way, as that would interfere with the independence of the magistracy.

In general, any administrative agency must inform the Prosecution about any criminal offenses of which it is aware. However, prosecutors may not give general instructions or orders to agencies within the executive. Nonetheless, the *Parquet* maintains strong links with agencies that do not themselves conduct criminal investigations on matters relating to competition rules and economic behavior, and prosecution offices and executive agencies can and often do cooperate in preparing criminal investigations and administering crime prevention policies.

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118 Criminal Procedure Code, Art. 41 (3).

119 See *supra* note 76.

120 See *supra* note 84.



#### 4.5. Relations with the judiciary

Prosecutors and judges are both considered magistrates. They belong to the same corporate structure, the magistracy, and share certain common budgetary, administrative, and disciplinary institutions. Their career paths are interrelated; judges may become prosecutors and vice versa.<sup>121</sup>

The fact that judges and prosecutors are jointly regulated also implies a level of professional equality rather than hierarchical subordination;<sup>122</sup> this may tend to reinforce the independence and autonomy of prosecutors. Prosecutors are independent of the judges to whose courts they are appointed; a court cannot give instructions, irrespective of their nature, to its attached prosecution office.<sup>123</sup> Prosecutors enjoy guarantees of autonomy similar to those of judges; for example, judges and prosecutors share identical protections against threats and any attacks related to their professional functions.<sup>124</sup> Judges and prosecutors are paid on an equal basis, and there is no difference between their salaries at each level. Remuneration of magistrates consists of a monthly salary and certain additional payments,<sup>125</sup> determined on the basis of government decree as part of the budget adopted by Parliament.

*The examining magistrate:* There is at least one examining magistrate (*juge d'instruction*) at each first-instance court. Examining magistrates belong to the judiciary, like any other judge, and act independently. They investigate serious offenses and supervise the work of judicial police officers in these investigations.<sup>126</sup> However, they institute investigative proceedings only at the request of a prosecutor. Prosecutors are under a duty to assign investigation of the most serious crimes to an examining magistrate; for less serious offenses (*délits* and *contraventions*),<sup>127</sup> the prosecutor may request an investigation at his discretion. Examining magistrates are assigned to cases from a list maintained by the President of a first-instance court, which specifies the rotation of examining magistrates. Thus a prosecutor in a given case cannot simply choose which examining magistrate will deal with that case.

The examining magistrate is independent in his investigation “*à charge et à décharge*” (which means that he must look for evidence in favor of and against the accused person), and he is obliged only to search for the truth. The Prosecutor, the defense lawyer, and the victim’s lawyer may ask the examining magistrate to take any action that could be useful for truthseeking in the case; the judge is free to take those requests into account. His decisions may, however, be submitted for review to a specialized chamber of the Court of Appeals.

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121 Magistrates Status Act, Art. I-1.II.

122 Protocol states that the President of the Court comes before the prosecutor attached to his court; however, they are considered equals.

123 See Debove and Falletti, *supra* note 10.

124 Magistrates Status Act, Art. 11.

125 Magistrates Status Act, Art. 42.

126 There are three types of investigation: investigation of a manifest offense (*flagrant délit*), preliminary investigation, and investigation of serious offenses (*délits graves*).

127 See *supra* note 68.



The examining magistrate conducts all interviews with witnesses; however, the prosecution and defense counsels may also ask questions or submit short explanations during these interviews, although these explanations are subject to the examining magistrate's discretion, as he may interrupt them when he decides that he has been sufficiently informed.<sup>128</sup> In the event of a manifest crime, and where an examining magistrate has not yet been assigned to the case, the prosecutor may order the arrest of a suspect<sup>129</sup> and proceed immediately with an interview of the suspect.<sup>130</sup>

The examining magistrate may either conduct additional investigations—such as hearings and visits to the crime scene—himself, or may issue rogatory letters instructing the judicial police to do so, and may otherwise ask the police to expedite an investigation. The examining magistrate may also consult experts from a list maintained by the Court of Appeals when technical issues arise. The examining magistrate compiles the results of his investigations in the case file, which may be reviewed by the prosecutor and the parties.

*Budget:* Individual prosecution offices and the courts to which they are attached jointly administer a common budget.<sup>131</sup>

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## V. Information Control

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Every citizen has the right to information about the operation of judicial bodies;<sup>132</sup> journalists have additional special rights and obligations concerning freedom of information. However, there are legal and professional limits on the *Parquet's* ability effectively to communicate with the public. Prosecutors have a duty of discretion and objectivity (“*devoir de réserve et d’objectivité*”) that limits their ability to disseminate information about cases.<sup>133</sup> Any person, including a prosecutor, involved with an investigation is obliged to protect confidential information,<sup>134</sup> and a prosecutor who reveals too much information to the public risks being sanctioned.

The *Parquet* is nonetheless allowed “to derive from the judicial investigation any and all elements which it requires and make use of these in the discharge of its functions.”<sup>135</sup> This allows prosecutors to reveal information in specific cases in order to

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128 Criminal Procedure Code, Art. 120.

129 Criminal Procedure Code, Art. 70 (1).

130 Criminal Procedure Code, Art. 70 (2).

131 See Section 2.2 above.

132 Report of the Truche Commission, *supra* note 12.

133 See Debove and Falletti, *supra* note 10.

134 Criminal Procedure Code, Art. 11.

135 Judgment of the Cassation Court, November 15, 1961. See also *Loi renforçant la protection de la présomption d’innocence et les droits des victimes*, law adopted June 15, 2000.

inform the public and avoid misinformation.<sup>136</sup> The recent trend towards greater transparency in the judicial system may, to a certain extent, increasingly oblige the *Parquet* to provide more extensive information to the public about significant cases; certain authors have also proposed allowing prosecutors to make information public about pending cases.<sup>137</sup>

The Minister of Justice develops policy regarding media access and public information. The Ministry has a special office to deal with communication matters (*Service de l'Information et de la Communication*); each head of a prosecution office has been asked by the Ministry to participate in a session about communication organized with journalists. As yet, however, the *Parquet's* own informational outreach is not well developed; there is no specialized unit to support the *Parquet's* relations with the media, and the level of attention given to publicizing information varies considerably among the different offices of the *Parquet*. The need to inform citizens about the operations of the judicial branch and the disposition of cases has served as an argument for the establishment of specialized public information structures. It has been recommended that such services be composed of selected magistrates designated by the chairpersons of the respective judicial bodies, and that they deal not only with cases of significant impact, but also with the overall operation of judicial and prosecutorial bodies.

Relations between the media and judicial bodies are regulated by law.<sup>138</sup> A responsible agent in each media<sup>139</sup> may be fined for distributing pictures of accused individuals without their consent prior to judgment or sentencing,<sup>140</sup> or for prematurely publishing an indictment.<sup>141</sup> They can also be fined for publishing information about non-public sessions and deliberations of the SCM.<sup>142</sup> These rules protect the rights of the accused and the institutional autonomy of prosecutors and the *Parquet*.

136 Jean-Pierre Dintilhac, *Rôle et attributions du procureur de la République*, REVUE DE SCIENCES CRIMINELLES ET DE DROIT PÉNAL COMPARÉ (2002), at 41.

137 Lemesle and Pansier, *supra* note 14, at 79.

138 *Loi du 29.07.1881 sur la liberté de la presse* [Law of July 29, 1881 on Freedom of the Press] [hereinafter *Media Act*] (regularly updated).

139 The authors, directors or editors of publications, the print media, and the distributors of publications may be criminally liable.

140 *Media Act*, Art. 35 ter (I and II).

141 *Media Act*, Art. 38(1).

142 *Media Act*, Art. 38 (2). Publishing information about disciplining magistrates or announcements concerning the Chairman or Deputy Chairman—that is, the President of the Republic or the Minister of Justice—is allowed.

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## VI. Statistics

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Each prosecution office records monthly data to follow the evolution of the crime rate; each year, a general national directory is published with data detailing the work of judicial bodies in both civil and criminal matters. However, the Ministry of Justice maintains that statistical indicators on the operation of judicial bodies are more difficult to develop for criminal policy than for civil policy, owing to the poorer quality of statistics in the field of criminal justice and the poor harmonization of statistics from the *Parquet*, judiciary, police, and incarceration authorities. In 2003, the government set up a research institute charged with gathering statistical information from the various bodies involved (police, justice, penitentiary) and developing a common approach.<sup>143</sup> At the same time, the Ministry of Justice itself is developing new software to make information about the functioning of the criminal justice system more accurate.

There has been a proposal by parliament to collect this type of data at the national level, with experts from the Ministries of Interior, Justice, and Defense attempting to harmonize the criminal law statistics to allow better follow-up on cases, from initial investigation through sentencing.

Surveys taken at the initiative of the Ministry of Justice Research Center take into account, in particular, the number of cases dealt with by the prosecution offices. Increasingly, they stress the ways in which those cases are handled, either through prosecution in court or through other means, such as restorative justice. Efforts are being made to develop an understanding of the efficiency of the prosecution service as a whole, including both of those paths. The results achieved are taken into account, along with the time taken, in order to reduce undue delays. This information is then used to develop practice guidelines and determine additional support.

Public awareness and attitudes towards Prosecution Office operations have not been systematically researched as such; however, a growing number of studies and surveys have been undertaken on the public's expectations and satisfaction with the general functioning of the justice system.<sup>144</sup>

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143 2001 Report on the Operations of the Ministry of Justice, available at Ministry of Justice website, [www.justice.gouv.fr](http://www.justice.gouv.fr).

144 See, e.g., the Ministry of Justice Research Center report *L'administration de la justice en Europe et l'évaluation de sa qualité*, available at <http://www.gip-recherche-justice.fr>.

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# Report on the Public Prosecution Service in Germany

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## I. General Issues

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The historical and conceptual legacy of the Prosecution in Germany as an independent “guardian of the law” (*Wächter des Gesetzes*), as it is commonly described, is still very much alive.<sup>1</sup> Thus the fundamental task of the Prosecution in Germany is not so much to represent the state in all its power as to support public order and legality; the Prosecution is the symbol of justice in a system based on the rule of law. Nonetheless, as a general rule, the powers of the Prosecution have been limited to criminal law enforcement.

German criminal law continues to be strongly marked by the experience of the undemocratic, dictatorial systems of the Third Reich and communist East Germany, which are viewed in part as a failure of the legal system. Therefore, judges and prosecutors, under the watchful eye of the public, are generally very careful to ensure that their actions uphold the rule of law.

Very roughly, one might characterize the reforms and changes in the German criminal justice system since World War II—changes that also affected the prosecution service—as follows: In the first 20 years, reforms aimed at strengthening the constitutional basis of criminal justice, above all improving the suspect’s legal position and that of his defense. Since the late 1960s, the main purpose of numerous reforms has been to make the criminal justice system more efficient and effective, in order to fight terrorism as well as new forms of organized crime without eroding the high legal standard that has been achieved. At the same time, the position of the victim has improved.

Germany’s federal and state prosecution services are characterized by a high level of transparency. Indeed, efficiency is sometimes sacrificed in the name of transparency; no other prosecution system, for example, requires so many decisions to be justified, generally in writing. Prosecutors and the police must document all their actions in writing in the files, which are very carefully kept. Prosecutors must provide grounds in writing, or orally at the main trial, for all their decisions and for any motions to the court. Defense lawyers have the right to see the entire case file, following the close of the investigation at the latest.

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<sup>1</sup> The Prosecution emerged as a separate office in Germany some 150 years ago as an independent “guardian of the law” within the state, following the French model, as an element in the rise of the ideal of the rule of law as a fundamental principle of governance, tracking the transition from a police state to a state under the rule of law. See Antoinette Perrodet, *The Public Prosecutor, in EUROPEAN CRIMINAL PROCEDURES* (Mireille Delmas-Marty & J.R. Spencer eds., 2002), at 416; E. Blankenburg & H. Treiber, *The Establishment of the Public Prosecutor’s office in Germany*, 12 *INTERNATIONAL JOURNAL OF THE SOCIOLOGY OF LAW* (1985), at 375. The term “guardian of the law” was first used in reference to the newly-introduced Prosecution Service by Prussian Minister of the Interior Friedrich Carl von Savigny around 1846. See Eberhardt Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege* (1965), at 336; Peter Collin, “*Wächter der Gesetze*” oder “*Organ der Staatsregierung*”? *Konzipierung, Einrichtung und Anleitung der Staatsanwaltschaft durch das preußische Justizministerium von den Anfängen bis 1860* (2000).

Other features of the system include the following:

In regard to most crimes, the German prosecution service has a monopoly on bringing charges before the court. Except for minor criminal offences, prosecutors are required to initiate an investigation whenever there is suspicion that a crime has been committed. This is true even if no definite suspect has been identified. Therefore, numerically, German prosecutors generally deal with more cases than do prosecutors in other countries. It is a criminal offense for a prosecutor to neglect to initiate an investigation in such situations. It is also a criminal offense for the prosecutor to open an investigation without the necessary suspicion.

Prosecutors must collect not only incriminating, but also exculpatory evidence for the defendant; in other words, the prosecutor is not considered an actual party to the proceedings.

Prosecutors must obey their superiors' instructions (known as the "internal right of instruction"). The fact that state and federal prosecutors' offices are subordinated to their respective Ministries of Justice means that the Minister of Justice also has the right to give instructions to the prosecutor (known as the "external right of instruction"). In turn, prosecutors may issue instructions to the police at any point in an investigation. The police are authorized and required to begin an investigation as soon as they suspect a crime, but regardless of their institutional independence, their investigation and the prosecutor's investigation form a single entity. The police must submit all their files to the prosecutor, who decides whether to terminate or continue a case.

For certain serious invasions of freedoms or rights, including economic rights (arrests, searches or seizures, electronic surveillance, etc.), the prosecutor must obtain a warrant from a judge. Exceptions can only be made in emergency cases.

Prosecutors and judges share a similar legal status. Training (study of law, two state exams) is the same, and acceptance into the profession is based on the same strict criteria. Pay and pensions are at the same level. However, unlike judges, prosecutors are not independent.

Prosecutors are expected to devote themselves to the important aspects of their job, and therefore are not expected to take care of routine business. German prosecutors' offices therefore have well-trained support staff.

The weaknesses of the German prosecutorial system are essentially the flip side of its strengths. The system, like the entire German judicial system, is extraordinarily personnel-, cost-, work-, and time-intensive, a situation exacerbated by the German tendency toward perfectionism. Thus cases are handled by all parties with great care and attention, but they also take far too long. The length of investigations and trials is the most common public criticism of the prosecution's work. Thus efforts at reform generally tend toward streamlining the system and reducing the costs, especially through increased use of electronic data processing and through budgeting reforms that allow prosecutors' offices greater independence in administering their finances.

The unsettled relationship between the prosecution service and the executive (a relationship that is never mentioned in the constitution) is problematic in terms of the political dependence it creates. Legally, the Minister of Justice has an unlimited right to issue instructions to the prosecutors below him, including instructions about how to handle specific cases. In practice, Ministers of Justice like to emphasize that they make very sparing use of this right. Nevertheless, the danger exists that, where there is significant political interest in the outcome of a case, prosecutors could be impermissibly influenced. Therefore, for years representatives of the prosecutorial service have been demanding elimination of the Ministers' right of instruction, or at least that such instructions only be permitted in written form. However, at present legislatures seem uninterested in such reforms. Other concerns include the danger that a case may be taken away from a prosecutor for political reasons.

Because of the complex federal division of power in Germany, there are seventeen separate prosecution services—one federal service and one for each of the sixteen states (*Länder*). However, many of the issues discussed in this report relate to all of these services, or at least all the state services. Consequently, this report will use “the Prosecution” to refer to *all* seventeen separate prosecution services, or “state Prosecution” to refer to the sixteen state prosecution services.

Unless explicitly noted to the contrary, any reference to a state official or institution interacting with “a prosecutor,” “prosecutors,” or “the Prosecution” refers to that state official or institution's respective jurisdiction. Thus “The Prosecution Service answers to the Minister of Justice” implies *each* Service answering to its *respective* Minister.

Since the procedures of Germany's 16 states vary to some extent, statements concerning specific state practice may not apply in detail to all states; in many cases, even where state laws are substantially similar, actual practice may vary. However, the basic tendencies referred to apply to all the states.

Following German unification, the East German prosecution service was broken up and former East German prosecutors, judges, and police officers underwent strict vetting for secret police ties and other undemocratic behavior. Many were retired, particularly those in leadership positions, who were replaced with West Germans. Others were reintegrated into the new justice system, which was completely restructured along West German lines. Discussion of the East German prosecution service would go beyond the scope of this report, as East German legislation has no implications for the structure and policies of the current German Prosecution Service.

## II. Structure and Organization of the Public Prosecution Service

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### 2.1. Internal structure

There is a separate Prosecution Service for each state (*Land*) and at the federal level. The relationships among these services follow the federal model, with the federal Prosecutor General (*Generalbundesanwalt*) having no authority over state prosecutors. Rather, each Prosecution Service answers to the Ministry of Justice of its respective state, which is politically accountable for the activities of the prosecution.

The federal and state prosecution services are distinct from one another. The large majority of prosecutions take place at the state level. The jurisdiction of state and federal prosecutors' offices is determined not by whether state or federal laws are violated (most criminal law in Germany is federal law), but by which crimes are designated federal crimes. The Federal Prosecution Service (*Generalbundesanwalt*) deals with offenses that affect the integrity of the country as a whole,<sup>2</sup> but it has no power to interfere with the conduct of the state services. The sources of law for the prosecution services are the federal Constitution (*Grundgesetz*), the Code of Criminal Procedure (*Strafprozessordnung*), the Law on Judicial Organization (*Gerichtsverfassungsgesetz*), the Criminal Code (*Strafgesetzbuch*) and the legislation of each state.

Like any other executive agency, the Prosecution Service is a hierarchical institution, with hierarchical subordination between the different levels of offices and within each office.

The organization and distribution of Prosecution Service offices mirror that of the courts, with the seat of each prosecution office coinciding with the seat of the court to which it is attached.<sup>3</sup> Thus, a Federal Public Prosecution Office functions at the Federal Supreme Court (*Bundesgerichtshof*). Most states have two-tiered prosecution services, attached to the State Supreme Court (*Oberlandesgericht*) and the regional courts (*Landgerichte*); the regional prosecution services also cover district-level courts (*Amtsgerichte*).

Higher level offices have supervisory authority over lower offices, and prosecutors must follow the instructions of their superiors (*Weisungsrecht*).<sup>4</sup> This includes the supervision of the Prosecution Service as a whole by the Minister of Justice and supervision within the Service of lower-ranking prosecutors by higher-ranking ones. Thus prosecutors at the State Supreme Court-level offices direct the work of prosecutors

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<sup>2</sup> *Gerichtsverfassungsgesetz* [Law on Judicial Organization] [hereinafter GVG], Art. 120, 142(a).

<sup>3</sup> *Einführungsgesetz zum Gerichtsverfassungsgesetz* [Introductory Act to GVG], Art. 8, 141.

<sup>4</sup> GVG, Art. 146, 147.

attached to each regional court; these prosecutors in turn supervise those in offices attached to the district courts. Superior prosecutors in this hierarchy can withdraw cases from their subordinates, taking the case themselves (*Devolutionsrecht*)<sup>5</sup> or reassigning them (*Substitutionsrecht*).<sup>6</sup>

Prosecution offices are generally divided into departments, specialized by type of crime; this internal division allows prosecutors to specialize. Administration is seen to by an administrative maintenance unit, which is not a separate department, but reports directly to the head of the Prosecution Service and is directed by a manager who is not a lawyer. The staff of a Prosecution Service in most states is comprised of the following:

- ▶ Prosecutor General (*Generalstaatsanwalt*, one or more per state)
- ▶ Chief Prosecutor (*Leitender Oberstaatsanwalt*), who heads each prosecution office
- ▶ Deputy Chief Prosecutor
- ▶ Department heads (*Oberstaatsanwälte*)
- ▶ Line prosecutors at the regional courts (in most *Länder*)
- ▶ Junior prosecutors (*Staatsanwälte auf Probe*)
- ▶ Enforcement officers (*Rechtspfleger*)
- ▶ Lower-level civil servants<sup>7</sup> responsible for record-keeping
- ▶ administrative staff
- ▶ Legal secretaries

Each office has trained enforcement officers (*Rechtspfleger*)<sup>8</sup> responsible for enforcing criminal sentences; these officers also usually maintain the registers of final judicial decisions. However, more important decisions relating to enforcement must be made or approved by a prosecutor. **The head of the administrative staff is usually a more experienced enforcement officer.**

The size of Prosecution Service offices may differ substantially. In city-states like Berlin and Hamburg and cities like Munich and Frankfurt, the prosecution office may employ more than a hundred prosecutors, while in small offices the number of prosecutors might not exceed 15 prosecutors. Offices generally have large administrative staffs, and prosecutors themselves do little administrative work.

*Federal Prosecution Office:* The Federal General Public Prosecution Office is divided into three departments: one dealing with first-instance cases, one charged with appellate review, and the third overseeing the Central Federal Registry.<sup>9</sup> The total staff is about 600 people, of which approximately 400 are with the Central Federal Registry. Prosecutorial functions of the Federal Prosecution Service are discharged by the

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<sup>5</sup> GVG, Art. 145.

<sup>6</sup> See Rodolphe Juy-Birmann, *The German System*, in *EUROPEAN CRIMINAL PROCEDURES* (Mireille Delmas-Marty & J.R. Spencer eds., 2002), at 299–300; Perrodet, *supra* note 1, at 437; Lutz Meyer-Gossner, *Strafprozessordnung* (2007); GVG, Art. 145.

<sup>7</sup> In Germany there are four levels of civil servants, depending on education and position. Literally translated, the categories of civil servants are: higher, high, intermediate, and ordinary.

<sup>8</sup> Enforcement officers are graduates of specialized colleges providing special legal training (*juristische Fachhochschule*).

<sup>9</sup> See Section 3.1 below.

Federal Prosecutor General, federal prosecutors, and research assistants.<sup>10</sup> The total number of prosecutors in the Federal Prosecution Service is more than 70.

*Performance Management:* No individual prosecutor has sole and exclusive charge of a specific case; within the same criminal proceedings, substitution of prosecutors is possible and does take place. In general, however, the head of a prosecution office (Chief Prosecutor) prepares a work distribution plan (*Geschäftsverteilungsplan*) at the start of the year for the upcoming year, following meetings with department heads and representatives of prosecutors, female prosecutors, and prosecutors with disabilities.<sup>11</sup> The plan establishes a uniform system of case assignments to prosecutors. Once the plan is adopted, changes are possible only in exceptional cases, such as a prolonged health related absence or conflict of interest, and they require renewed discussion with the various parties involved. The system allows individual prosecutors to be involved with a case from the very start and stay on through to completion. However, the rigidity of the work plan can reduce the office's flexibility and make it more difficult to assign a case to the person best suited for it. The head of the office could in theory disregard the established assignment system and give a case to a different prosecutor. In practice, the office head would normally discuss such a step with the parties and the Prosecutor's Council (the prosecutors' workplace representative body).

The Minister of Justice and the Prosecutor General are also bound by the plan. This increases transparency in the work of the prosecution office and reduces manipulation. The Minister and the Prosecutor General will not directly intervene in the planned distribution of cases, save for recommendations in exceptional cases. In practice, such recommendations are a very rare occurrence. Nonetheless, the Prosecutor General and the head of the Prosecution Service within his or her area are in constant informal contact to discuss issues concerning the staff and its work.

## 2.2. Budgetary process

Each Prosecution Service drafts a budget for each year, in cooperation with local prosecution offices, and sends it to the Ministry of Justice. The Ministry passes the budget on to Parliament, which decides on the overall budget and returns it to the Ministry for final allocation.

In general, every Prosecution Service is in constant contact with the Prosecutor General and the Ministry in regard to budgetary issues. The head of a Prosecution Service will notify his or her superiors if the Prosecution Service he or she heads suffers from a shortage of staff, facilities, or financial resources. If the situation becomes particularly problematic, he or she will even bring it to the attention of the public,

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10 Research assistants are judges or prosecutors from the states who are seconded to the Federal General Public Prosecution Office for a set period of time, usually three years.

11 Representatives for women and people with disabilities, found in most government offices, are intended to redress the underrepresentation of women and the disabled in these offices. They serve only in an advisory capacity; they must be consulted on hiring and promotion decisions, but have no right of final decision.



which will result in conflict with the Ministry of Justice. Such public complaints are not uncommon.<sup>12</sup>

In the past, the respective state or federal Ministry of Justice administered the entire prosecution budget centrally, including allocations and expenditures. More recently, however, in the interests of increased economy, prosecution services have been given greater responsibility for their own budgets through increased flexibility to make savings and spending decisions. This discretion does not extend to core functions such as investigations, for which spending continues to be centrally administered, to ensure that savings do not occur at the expense of efficient completion of prosecutorial tasks (such expenditures include payment for expert witnesses, travel, and the like). This system appears to be working well, as local offices are more aware of their needs and can better allocate resources.

### 2.3. The status of the Prosecutor General

*The Federal Prosecutor General:* The Federal Prosecutor General (*Generalbundesanwalt*) is the head of the Federal Public Prosecution Office, and is a public official within the executive branch. The German President appoints the Prosecutor General upon nomination by the Minister of Justice; the Minister's nomination must first be approved by the *Bundesrat*, the upper house of the legislature.<sup>13</sup> The Federal Prosecutor General is a civil servant<sup>14</sup> and must meet the same requirements as any other prosecutor. He or she is accountable to the Minister of Justice. The Minister is politically accountable to the federal government and the legislature for the activities of the Prosecutor General.

The office of the Federal Prosecutor General is hierarchical and monocratic; federal prosecutors subordinated to the Prosecutor General act as his representatives.<sup>15</sup> The Prosecutor General can give mandatory instructions to subordinate prosecutors, which may be general or related to individual cases. In practice, however, **such instructions** are not common and do not play an important role; the more common approach is to seek solutions and make **decisions on a consensual basis. While this approach**, which is the norm throughout the prosecution services in Germany, sometimes delays proceedings to a greater degree than a more hierarchical reliance on commands, it provides individual prosecutors with a sense of responsibility and confidence.

*State Prosecutors General:* State Prosecutors General are attached to the Supreme Court of each state. It is possible for a state to have more than one Supreme Court. The state of Hesse has only one Supreme Court, for example, while Bavaria and North Rhine-Westphalia have more than one, and accordingly, more than one Prosecutor General.

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12 See, e.g., *Der Leiter der Lübecker Staatsanwaltschaft fordert dringend von der Regierung in Kiel neue Stellen*, DIE WELT, Nov. 30, 2003.

13 GVG, Art. 149.

14 GVG, Art. 148.

15 GVG, Art. 144. The Federal Prosecutor General does not exercise control over prosecutors in the individual state Prosecution Services.

State Prosecutors General are civil servants<sup>16</sup> and must meet the same requirements as other prosecutors; indeed, as a rule, Prosecutors General are selected from among active prosecutors. Prosecutors General in most states are appointed for life. Most can be removed from office only for violation of their official duties, though this seldom happens.<sup>17</sup> However, in some states they have the status of political appointees (*politische Beamte*) and can be removed from office at will, at a guaranteed 75% of their salary. In 2001 and 2003, two cases occurred in which state Prosecutors General were forced into retirement because of political disagreements with the state Ministers of Justice. Many in the justice system find this practice quite troubling, as it can expose Prosecutors General—and through them, the entire hierarchical service—to considerable political pressure. Yet some states seem to be moving toward even greater dependence: Hesse, for example, has introduced a five-year probationary period for each newly appointed prosecutor, including the Prosecutor General. Although justified by a desire to improve efficiency among prosecutors, this arrangement may in fact increase the dangers of political pressure.

The Prosecutor General reports to the Minister of Justice, often orally. On major cases, it is common practice to have the Prosecutor General, the head of the relevant department, and the prosecutor in charge of the case report jointly to the Minister. There is no data on the frequency or content of such meetings; these aspects depend on the management style of the Minister of Justice.

The Prosecutor General completes an in-depth review of the work of each prosecution office every three years. The review is carried out by a team appointed by the Prosecutor General and covers all aspects of the Service's work, including overall indicators and inspection of randomly selected case files. The report is submitted to the Minister of Justice and the head of the prosecution office; as a follow-up, the Prosecutor General monitors implementation of the report's recommendations. These reports are not public.

## 2.4. The status of individual prosecutors

Like judges, prosecutors are civil servants (*Beamten*) whose work is regulated by the Federal Civil Service Act (*Bundesbeamtengesetz*). They enjoy secure tenure and have the right to a salary (higher for prosecutors than for most civil servants) and to a pension. Their status, including appointment and dismissal from office, is regulated accordingly.<sup>18</sup> Unlike judges, who enjoy a high level of independence, they must obey instructions from their superiors;<sup>19</sup> the prosecution service is hierarchical. A prosecutor's superior may entrust a case to another prosecutor or take it over him or herself. Prosecutors are more independent than most civil servants, however, and

<sup>16</sup> GVG, Art. 148.

<sup>17</sup> There has been no instance of a Prosecutor General being removed from office for a breach of duty or for committing a crime.

<sup>18</sup> See *Bundesbeamtengesetz* [Federal Civil Service Act].

<sup>19</sup> GVG, Art. 146.

subordination is not absolute. If, for example, a prosecutor believes a crime may have occurred, a superior's instruction not to proceed with the investigation is invalid, in line with the principle of compulsory prosecution (discussed below).

If they have doubts about the legality of certain instructions, prosecutors must take their concerns to their superiors.<sup>20</sup> If they cannot convince their superiors of this illegality, the superior may substitute a different prosecutor. Prosecutors can also protect themselves against instructions they consider illegal or ill-founded by exercising their right to withdraw from a specific case without incurring the risk of official internal sanction.<sup>21</sup> This is an additional guarantee of the lawful conduct of criminal proceedings and an assurance that prosecutors will act based on their own convictions. Finally, prosecutors are not expected to obey orders if they require commission of a crime or the violation of human dignity.<sup>22</sup>

*Appointment:* Selection as a prosecutor is highly competitive, with many candidates for each vacancy. Prosecutors are appointed by the Minister of Justice; in some states, this occurs from **among candidates recommended by a commission for the selection of judges (*Richterwahlausschuss*)**.<sup>23</sup> The commission pays special attention to providing equal opportunities to both sexes. The commission includes members of the state legislature from all represented political parties, the president of the state Supreme Court (*Oberlandesgericht*), and the president of the state bar association.<sup>24</sup> However, not every state has such a commission.

20 Federal Civil Service Act, Art. 56(2). In general, the prosecutor and his or her superior will discuss the issue and one or the other will be convinced.

21 Werner Beulke, *Strafprozessrecht* (2006) at marginal no. 85.

22 Federal Civil Service Act, Art. 56(2).

23 The Minister of Justice is not bound by the recommendation of the commission, but may not appoint a candidate the commission has declared unsuitable. The most important element in the appointments process is the exam grade; in general, only those in the top 5–10 percent ultimately receive appointments. In Bavaria, for example, only candidates achieving a certain minimum grade on the state examinations may submit applications. The actual grade necessary for appointment is determined by the available vacancies, and the number and qualifications of applicants. The Ministry of Justice also conducts personal interviews with candidates.

24 Individual states may develop additional requirements for judicial or prosecutorial positions that apply both at the time of appointment and in further career development. For instance, Bavarian legislation contains additional requirements concerning:

*Professional qualities:* In addition to exam grades, candidates are assessed for such qualities as decisiveness, initiative, organization, and ability to argue. Other professional experience and capacity—such as knowledge of foreign legal systems, experience as a private lawyer, or teaching experience—can be considered as well. Candidates must be prepared to become either judges or prosecutors, because of the possibility of transfer from a judicial to a prosecutorial position. (Such transfers are characteristic of all southern German states).

*Personal qualities:* Besides professional skills, the personal qualities of candidates are also assessed during selection, such as commitment to democratic principles and state criminal policy, moderate and considerate conduct both in and outside the office, impartiality, teamwork skills, and willingness to change location.

*Health status:* Candidates must possess a medical certificate of fitness for occupying the relevant position attesting that they can withstand the mental and physical pressures.

See website of the Bavarian Ministry of Justice, job specifications for a position as prosecutor or judge, under *Anforderungsprofil*, available at [http://www.justiz.bayern.de/imperia/md/content/stmj\\_internet/ministerium/ministerium/berufe\\_stellen/anforderungsprofil\\_ri\\_sta.pdf](http://www.justiz.bayern.de/imperia/md/content/stmj_internet/ministerium/ministerium/berufe_stellen/anforderungsprofil_ri_sta.pdf).

All candidates for positions as judges or prosecutors must first successfully complete the so-called second state examination in law before appointment. Approved candidates apply for positions to the Ministry of Justice. The head of an office with a vacancy then proposes a specific candidate to the Prosecutor General and to the representatives of female prosecutors and prosecutors with disabilities, who make a recommendation to the Minister of Justice based on a detailed account of the candidate's abilities. The recommendations of the Prosecutor General and the representatives do not bind the Minister of Justice, but in practice they are usually followed. A candidate who thinks that he or she has been unjustly rejected can file an appeal (*Konkurrentenklage*) to an administrative court demanding that no other candidate be appointed to the vacancy unless the Minister can justify his decision in court, proving it was well founded. This guarantees transparency of the process and is a strong disincentive to personal or political favoritism. However, it can also mean that a position remains unfilled for years while the courts deliberate. The actual frequency of such appeals varies from state to state.

At the federal level, the Prosecutor General is chosen based on his or her qualifications and is confirmed by Parliament. The Prosecutor General is appointed for life, which in practice means until the retirement age of 65. The federal prosecutor's office is staffed exclusively by prosecutors with prior experience at the state level, seconded from state prosecutors' offices by state Ministries of Justice. Experience at the federal prosecutor's office is considered important for promotion within state prosecutors' offices, and these positions are therefore desirable.

*Tenure:* A candidate is initially appointed as a junior prosecutor (*Anfänger*)<sup>25</sup> on a temporary basis for a test period of three years, after which he can be appointed to a permanent position, provided he meets other legal requirements.<sup>26</sup> Once tenured, a prosecutor can usually stay in the same position, unless he wishes to move or is promoted.

After an additional three to five years, a prosecutor can apply for a half-year training period at the Prosecutor General's office. The certificate received at the end of this period, while not officially necessary for promotion, is in practice crucial for it.

Prosecutors (and judges) may also work temporarily at the Ministry of Justice. This movement between the Ministry and the Prosecution Services encourages fruitful exchange between administrative and lawmaking bodies, on the one hand, and those involved directly in practice, on the other. For the individual prosecutor, working for a time at the Ministry of Justice is often a springboard to promotion. The personal

25 A beginning or junior prosecutor (sometimes called "Assessor") initially has limited powers, and is assigned a tutor. All documents signed by the junior prosecutor must be co-signed by the tutor. In all other respects, however, the decisions of a junior prosecutor are in no way different from those of any other prosecutor and are equally valid. After a few months, the junior prosecutor is normally granted the right to sign documents on his own (*Zeichnungsrecht*), and can decide any aspect of the case except for the decision to indict or to terminate proceedings. After a certain time period, the junior prosecutor receives full rights to sign decisions (*grosse Zeichnungsrecht*), and receives the same status as any other prosecutor, except tenure.

26 Requirements include German citizenship, adherence to core constitutional principles, requisite educational qualifications and training, and no criminal record; for tenure, a candidate must be at least 27 years old. Federal Civil Service Act, Art. 7.

connections built up during such internships may have both positive and negative effects on the Prosecution Services: they can make it easier for the political branch to exercise pressure on individual prosecutors, but they can also facilitate access to resources for the Prosecution Service through informal ministerial contacts.

*Evaluations and Promotions:* Prosecutors are evaluated every three years. These evaluations serve mainly to help in determining promotions. They are discussed with the prosecutor under evaluation, and a prosecutor may appeal a negative evaluation. For this reason, evaluations tend to be overly positive, which lends them somewhat less weight in the promotions process. Informal discussion among those familiar with candidates' work provides an unofficial means of collecting more accurate information before promotion decisions.

A prosecutor requires at least ten years' work experience to apply for a senior position. Every promotion must be advertised in the bulletin of the state Ministry of Justice. Only positions provided for in the state budget may be filled. The head of the prosecutor's office that has the position reviews applicants' files, including current evaluations. The evaluation must include the applicant's prior achievements, capabilities, and fitness for the position in question. The head of office then recommends a candidate to the Prosecutor General's office, which consults with the representatives for women and the disabled before making a final decision.

Once tenured, a prosecutor cannot be removed from office except after a final verdict for commission of a crime or serious breach of discipline by a disciplinary tribunal. In such cases, the prosecutor loses all rights as a civil servant, including retirement benefits.<sup>27</sup> Such instances are quite rare, however, and any such cases are generally resolved by way of the early retirement option available to civil servants.

*Restrictions on Activities:* Prosecutors' conduct is restricted in ways that underscore the nature of the Prosecution Service as neutral civil servants. Prosecutors are obliged to withdraw from cases where specific conflicts of interest exist.<sup>28</sup> They are barred from giving paid legal counsel or counsel not related to their official duties, or otherwise undertaking remunerative activities in addition to their prosecution work without explicit permission.<sup>29</sup> It is unusual for permission to be granted for business activities.

Prosecutors may be active, and may even take leadership roles, in churches and (in contrast to the situation in many other countries) in political parties. Officially, the law requires civil servants, including prosecutors, to exercise "restraint" (*Zurückhaltung*) and "moderation" (*Mässigung*) in the extent of their political activism,<sup>30</sup> but this

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27 See Section 2.5 below.

28 These include being a party to the proceedings or a victim of the offense; being a relative of a party or victim; and having participated in the proceedings as a judge, police officer, or other party. Particularly in smaller jurisdictions, such conflicts of interest will arise frequently (for example, in the not-uncommon case in which a prosecutor's spouse works as a private attorney and is defending a suspect), and will lead to substitution of the responsible prosecutor.

29 *Richtergesetz* [Judicial Act], Art. 41, 122(3). As an exception, prosecutors are allowed to serve as law professors or evaluate state exams, provided this does not affect the exercise of their prosecutorial functions. Judicial Act, Art. 7.

30 Federal Civil Service Act, Art. 53.

standard is vague and has little meaning in practice. Disciplinary proceedings against politically active prosecutors are unlikely, as they would bring extremely negative reactions from Germany's powerful political parties. While there is little evidence of any overt effects of political activity on prosecutorial work, such activity can lead to more subtle problems. If a party member is a suspect in a case, for example, a politically active prosecutor might at least appear to have a conflict of interest, which would require substitution of another prosecutor; conversely, prosecutors may be overly eager to prosecute fellow party members in order to prove lack of bias. In any event, political membership and activity by a judge or a prosecutor can influence the public's perception of their impartiality and thus negatively affect the prosecution service.

## 2.5. Individual accountability of prosecutors

There is a strong ethic of independence and professional respect within the Prosecution Services, and in general prosecutors are given full responsibility for their own work.<sup>31</sup> Prosecutors are rarely monitored by superiors except in high-profile or complex cases or those involving major expenditure of resources. The ethic of independence acts as a deterrent to arbitrary acts by superiors. In addition, the prosecutorial profession is characterized by a high degree of collegiality and shared responsibility, which also acts as a brake on hierarchical behavior by higher-ranking prosecutors and ensures that decisions are generally made through discussion and consensus.

If a prosecutor disagrees with a superior's instructions or has other disputes with a superior,<sup>32</sup> he or she must first discuss this with the superior. If the disagreement remains unresolved, the prosecutor may formally complain to the next-higher superior. If a problem involves personnel rather than legal issues, a prosecutor may also complain to the Prosecutor's Council (*Staatsanwaltsrat*), the workplace representative body for prosecutors; non-legal staff may complain to the Personnel Council (*Personalrat*), the workplace representative for non-legal staff. Final appeal to the Ministry of Justice is also possible.

Members of the *Staatsanwaltsrat* and the *Personalrat* meet at regular intervals with the chief prosecutor to discuss the situation in the office, including problems that may arise. These meetings are recorded in writing if requested by one of the participating parties.

*Disciplinary Procedures:* In the absence of any special rules, prosecutors are subject to the same disciplinary rules and procedures (*Disziplinarordnung*) as other civil

31 See, e.g., a regulation issued by the Hesse Ministry of Justice, *Anordnung über Organisation und Dienstbetrieb der Staatsanwaltschaft* [Regulation on the Organization and Operation of the Prosecution Service], JUSTIZMINISTERIALBLATT FÜR HESSEN, Nov. 17, 1988, at 950 [hereinafter *Regulation of the Hesse Ministry of Justice*]. Similar regulations governing the relationship between justice ministries and prosecution services exist in all states.

32 In the experience of one author of this report during many years as a chief prosecutor in Hesse, the most common complaints are not about differing interpretations of the law, but about overwork. Prosecutors complain that they cannot handle the volume of work and that trials therefore take too long.



servants. In case of a disciplinary infraction, a prosecutor may be informally sanctioned by a superior through a written admonition (*Rüge*) that does not go into the prosecutor's permanent file.<sup>33</sup> For more serious misconduct, a prosecutor may be subjected to disciplinary procedures before a disciplinary tribunal (*Dienstgericht*).<sup>34</sup> This three-judge court is part of the administrative court system; one of the judges on the disciplinary tribunal for prosecutors must be a prosecutor. Sanctions before such a tribunal include an official reprimand (*Verweis*), which must be justified in writing and is placed in the prosecutor's permanent file. Other sanctions may include reduction in salary, demotion, or dismissal from office. Such sanctions are extremely rare, however, as prosecutors are more likely to resign before reaching this point. Decisions of state disciplinary courts are subject to appeal before the Federal Disciplinary Court, which is attached to the Federal Supreme Court.

Prosecutors may be held liable for damages resulting from their willful acts or gross negligence. The Ministry of Justice is responsible for compensating for such damages, and may then hold the individual prosecutor liable. However, this is quite rare, as willful or gross negligent misconduct is unusual and damages will usually be ascribed to the fact that prosecutors are overburdened and, as a result, make mistakes. Prosecutors are in any case required to have insurance for their professional activities. Premiums are paid by the prosecutor and are tax deductible.

Prosecutors are not immune from criminal prosecution. Under the principle of compulsory prosecution, for example, a prosecutor can be held criminally liable for either failing to open an investigation when a crime is suspected, or investigating an innocent party. Prosecutors are frequently accused of such offenses by citizens, but the cases do not generally go beyond the investigative stage, as evidence must be shown of intent on the part of the prosecutor, which is rare.

There is no official code of ethics for prosecutors. Nevertheless, prosecutors are expected to follow general ethical rules in their work. Like other civil servants, prosecutors swear an oath to act in accordance with the laws and the constitution and to maintain their objectivity; violations of these duties can be treated as disciplinary infractions.

## 2.6. Training

*Preparatory Education:* The education of future prosecutors is identical to that of all other lawyers, regardless of their subsequent choice of career path. Only an individual meeting the requirements and holding the necessary qualifications to occupy a judicial position may be appointed as a prosecutor.<sup>35</sup> In order to hold a judicial or prosecutorial position, a candidate must have studied law at an institution of higher

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33 In the experience of the authors, the great majority of infractions by prosecutors, about 95 percent, are handled through such superior sanctions, without disciplinary proceedings. Sanction by a superior is not technically considered a disciplinary procedure proper.

34 Judicial Act, Art. 122(4). The disciplinary tribunals also discipline judges—another example of the quasi-judicial position of the Prosecution Service.

35 Judicial Act, Art. 122.



education, completed a mandatory two-year training internship, and passed two state examinations (administered by the states and somewhat different from state to state).

*Professional Training:* The education of prosecutors is generally of very high quality. Training after entry into the profession, however, is not mandatory, and depends largely on the individual prosecutor's personal interest in continuing education.

Junior prosecutors attend mandatory courses in different legal fields organized by the Prosecutor General on a systematic basis; these provide them with training in the most important aspects of their future work. Both the state and federal governments offer an abundance of non-mandatory continuing education courses for active prosecutors who have passed the probationary period. Ministries of Justice organize training courses for department heads and Chief Prosecutors, with special attention to management skills. For specialized state-level training courses, attendance is determined by the state Minister of Justice, upon the recommendation of the Prosecutor General and the Chief Prosecutors. The German Judicial Academy (*Deutsche Richterakademie*), with seats in Trier and Wustrau, as well as other institutions,<sup>36</sup> also offer legal training and continuing education for judges and prosecutors.

Attendance at all of these continuing education courses is voluntary. However, every prosecutor's office must have one or more specialists in a variety of fields (economic crimes, juvenile crime, drug and traffic crimes), and this specialization is either helped by, or explicitly requires, extra training. Thus participation in training and continuing education courses, while not mandatory, will greatly increase a prosecutor's chances of promotion. Younger prosecutors are often encouraged to seek additional training, depending on their interests.

In general, too, prosecutors are expected to keep up with recent legal developments; indeed, ignorance of such developments can lead to a charge of gross negligence. Training programs are offered to inform prosecutors of major changes in the law.

Overall, the system of continuing education and training, though rich and varied, is relatively disorganized, partly as a result of Germany's federalized prosecution system. The lack of any mandatory continuing legal education may be considered a weakness in the system.

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<sup>36</sup> These include the European Judicial Academy (*Europäische Richterakademie*) and the Central Criminology Institute (*Kriminologische Zentralstelle*) in Wiesbaden.

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### III. Functions and Powers of Prosecutors

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#### 3.1. Prosecutorial functions in criminal justice

The criminal justice process is structured so that external monitoring exists at every level. The Prosecution Service supervises the police, and the courts supervise the Prosecution.<sup>37</sup>

Prosecutors are not parties to criminal proceedings in the same sense as criminal defendants or plaintiffs are in civil proceedings. A prosecutor is expected to act only for the protection of legality and discovery of objective truth, as a “guardian of the law,”<sup>38</sup> and therefore has only limited formal discretion in pursuing investigation and prosecution. He must exercise his powers, on behalf of the state, in an objective and impartial manner.<sup>39</sup>

Within this structure, the Prosecution Services have a near-monopoly over the prosecution of crime, as well as a key role in investigation. The Prosecution Services have three major functions: they are the “master of the investigation” (*Herr des Ermittlungsverfahren*); they are responsible for criminal prosecution; and they are in charge of sentence enforcement (*Strafvollstreckungsbehörde*)<sup>40</sup> (here Germany differs from many other countries in which courts or police have responsibility for enforcement of penalties). More broadly, prosecutors also exercise control over the legality of investigations, including monitoring for abuse of powers.

*Discretion to Initiate Prosecution:* Prosecutors follow the principle of compulsory prosecution (*Legalitätsprinzip*): They are obliged to investigate all offenses as soon as the facts are sufficiently established (*Tatverdacht*), regardless of whether the identity of the offender has been determined.<sup>41</sup> Failure to do so is a crime.<sup>42</sup> For this reason, the number of cases initiated in Germany seems very high compared to other countries.

However, successive reforms have weakened the impact of the principle on the system, introducing some elements of discretionary prosecution (*Opportunitätsprinzip*), which allows a prosecutor to drop a case even if sufficient evidence exists to bring a

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37 The public can also exercise a measure of oversight through the public nature of hearings, and the media may also request information as long as this does not impede investigation. This guarantees a high level of transparency in the process as a whole.

38 See *supra* note 1.

39 See, e.g., B. Huber, *The Office of the State Prosecutor in Europe: an Overview*, in INTERNATIONAL REVIEW OF PENAL LAW, CRIMINAL JUSTICE AND HUMAN RIGHTS (1993), at 559 et seq.

40 Claus Roxin, *Strafverfahrensrecht* (1998), at 51 et seq.; Werner Beulke, *Strafprozessrecht* (2006), at marginal no. 79.

41 *Strafprozessordnung* [Code of Criminal Procedure], Art. 152(2).

42 *Strafgesetzbuch* [Penal Code], Art. 258, 258a.

charge; procedures also exist to decide cases without trial. State Ministers of Justice have been the driving force behind this greater prosecutorial discretion, with the overall aim of reducing prosecutors' workload.

In practice today, the principle of compulsory prosecution only fully applies to crimes of violence and other serious crimes; in all other cases, prosecutors enjoy considerable discretionary power,<sup>43</sup> which they frequently exercise to expedite their heavy case-loads in a cost-efficient manner. Thus today, 60-65 percent of all cases are concluded without trial. Most simply, prosecutors can agree to drop the charges for less serious offenses involving "little guilt" and no public interest in prosecution, if a judge consents;<sup>44</sup> for some minor offenses, the court's consent is not even required.<sup>45</sup> Charges may also be dropped where the sentence would be inappropriate or when the consequences of the offense affected the accused himself. Prosecutors may also enter into negotiations with the accused and agree to conditionally drop charges in cases where the "seriousness of the offender's guilt" does not require prosecution. In such cases, prosecutors generally require the accused to pay a sum of money to the government or to a non-profit organization or perform community service. After the accused has fulfilled the condition set by the prosecutor, the charge is dropped.<sup>46</sup> In such cases, the charge does not go on the defendant's record, and the prosecutor need not justify the agreement in writing. As prosecutorial use of this method has increased, states are beginning to lay down guidelines to reduce disparities that are emerging in the treatment of similar crimes, with regard to both the infractions that are subject to such agreements and the fines that are levied.<sup>47</sup>

Prosecutors may also employ a more formal procedure, the penal order (*Strafbefehlsverfahren*), at the end of the pre-trial phase of the criminal proceedings, or even after the start of the trial; it is available for misdemeanors punishable by a fine or suspended sentence of up to one year.<sup>48</sup> In this procedure, with the agreement of a judge, a defendant who admits guilt need not undergo (or complete) a trial. The prosecu-

43 See Joachim Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 UNIVERSITY OF CHICAGO LAW REVIEW (1974), at 468; Joachim Herrmann, *Bargaining Justice—A Bargain for German Justice?*, 53 UNIVERSITY OF PITTSBURGH LAW REVIEW (1992), at 755; Heike Jung, *Legalität oder Opportunität im Strafverfahren?*, in RECHT UND GESETZ IM DIALOG III (H. Pruetting ed., 1986), at 55.

Further exceptions to the principle of compulsory prosecution include: certain offenses (insult, forcible entry into the home) requiring a complaint from the victim (*Antragsdelikt*); offenses prosecuted by the victim (*Privatklagedelikt*); and certain political offenses requiring prior authorization from political authorities (*Ermächtigungsdelikt*). State prosecutors may drop charges for offenses committed abroad. Code of Criminal Procedure, Art. 153(c). If a suspect faces multiple charges for related offenses, the prosecutor may drop less important charges if the accused has been or is likely to be sentenced on more serious charges. Code of Criminal Procedure, Art. 154(a). Charges can also be dropped in cases where the accused committed the offense under duress or as a result of blackmail. Code of Criminal Procedure, Art. 154(c).

44 Code of Criminal Procedure, Art. 153.

45 *Id.*

46 Code of Criminal Procedure, Art. 153(a)(1) and (b)(1). Many Prosecution Services have established a mandatory procedure for implementing this provision, which requires a department head to sign any such decision along with the prosecutor in charge of the case.

47 Perrodet, *supra* note 1, at 449–450. This method of dealing with cases is controversial, as by its nature it violates the basic principles of the system of compulsory prosecution.

48 Code of Criminal Procedure, Art. 407–412.

tor drafts an order that suggests finding the defendant guilty and imposing a penalty and submits it to the judge along with the case file. In most cases, the judge will sign the order, which will then be sent to the defendant. Should the judge reject the penal order, the case must go to trial. In this procedure—if accepted by the judge—the agreement is in writing, the charge goes on the defendant's record, and the penalty is in most cases a fine. Prosecutors increasingly use the *Strafbefehl* as a means of reducing case-loads and saving resources. For the defendant whose guilt is not in doubt, it saves the expenditure and difficulty of a trial.

In cases where the prosecutor is of the opinion that the evidence is insufficient for conviction, he or she may terminate (*einstellen*) proceedings during the investigative stage, and thus acts as a filter ensuring that only sufficiently grounded cases go to court. The prosecutor is obliged to give reasons for a decision to terminate the proceedings; the decision must be sent to the original complainant, who may appeal this decision, first to the prosecution office responsible for the decision, and then to the Prosecutor General. Every prosecution office has an interest in making decisions that will not be overturned by the Prosecutor General, and consequently decisions to terminate proceedings are usually made with care.

A victim dissatisfied with the termination of criminal proceedings following complaint to the Prosecutor General may appeal to the state Supreme Court to require the prosecutor to bring the case to trial (*Klageerzwingungsverfahren*).<sup>49</sup> This constitutes a form of control by the courts over the powers of the prosecutor.<sup>50</sup> However, this possibility is available only if the case has been dropped for lack of evidence, not if it is dropped because of a prosecutor's discretionary determination that the case is minor and there is no public interest in prosecution, as described above. Since it has become common for prosecutors to drop cases for the latter reasons, with little opposition from judges, in practice little control exists on prosecutorial discretion to drop charges. Even where such appeals would be applicable, they are rare and courts seldom grant them.

Victims of crimes can initiate private prosecutions (*Privatklageverfahren*) for a number of minor crimes.<sup>51</sup> The Prosecution is not obliged to take part in these proceedings, but the court may inform the Prosecution of a private prosecution if some public interest is at stake and the court considers the participation of the Prosecution necessary, and the Prosecution may join such proceedings at any point. In practice, private prosecution is extremely rare, as a private person bringing charges (*Privatkläger*) faces the expense of hiring a lawyer and other costs of prosecution.

In practice, the Prosecution retains an effective monopoly over bringing charges before the courts. There has recently been discussion of allowing the police to bring charges on their own initiative for minor crimes, in order to relieve the Prosecution

49 See Georg Bischoff, *Das Klageerzwingungsverfahren. Eine empirische Analyse mit Vorschlägen zur Reform* (1987).

50 See F. Juetter, *Sinn und Grenze des Legalitätsprinzip im Strafverfahren* (1976); F. Heyden, *Begriff, Grundlage und Verwirklichung des Legalitätsprinzip* (1961); Wilfried Bottke, *Zur Anklagepflicht der Staatsanwaltschaft*, in 128 *GOLTDAMMERS ARCHIV FÜR STRAFRECHT* (1980), at 302.

51 Code of Criminal Procedure, Art. 374. Private prosecutions can be brought for violating the inviolability of the home, insult, minor bodily injuries, threat, and damage to personal items.

Services' backlogs. For certain offenses that are easy to handle, such as traffic crimes, police would be allowed to draw up charges and submit them to court. This would be permitted only in cases where penal orders are used, and as always, the judge would have the power to reject any such order. Prosecutorial response to this initiative has been largely negative. Police have no prosecutorial or legal training, and prosecutors see such expanded police authority as an incursion into prosecutors' control of the prosecution process and their monopoly on contact with the courts.

*Control of the Investigative Pre-Trial Phase:* The purpose of the investigation is to discover the objective truth and, on this basis, to decide whether to take a case to court or terminate proceedings. Bringing charges is a central requirement for proceedings to enter the trial stage. The Prosecution or its executive organs are obliged to begin an investigation and to preserve evidence as soon as a committed or attempted offense becomes known,<sup>52</sup> regardless of source.<sup>53</sup> If the prosecutor does not file charges, a victim may compel him to do so (*Klageerzwingungsverfahren*).<sup>54</sup>

Prosecutors have an obligation to "ensure that no guilty perpetrator escapes sentence and no innocent person is prosecuted,"<sup>55</sup> and they function in principle as lawyers for the defense as well as the prosecution. That is, they are expected to collect evidence that would exonerate the defendant as well as evidence against him.<sup>56</sup> Indeed, if a prosecutor does not present information beneficial to the defense, he would be violating his prosecutorial obligations and could be subject to disciplinary proceedings.

The Prosecution Services may in theory conduct any phase of investigation,<sup>57</sup> although in practice they normally delegate these responsibilities to the police.<sup>58</sup> Prosecutors generally give instructions to the police authorities, who then assign actual investigative tasks to individual police officers. Prosecutors may also be assigned more experienced officers, called "investigative officers," with additional detective powers; prosecutors work more closely with these investigative officers and can issue orders to them directly. In some cases, specialized commissions made up of more experienced police officers may be set up, in which case, too, prosecutors may issue orders directly to the officers involved. Prosecutors are supposed to directly supervise police investigative actions, though in practice, police usually conduct their investigations

52 Code of Criminal Procedure, Art. 160, 163.

53 A report (*Strafanzeige*) by a citizen or administrative body merely informs the Prosecution Service of a crime, whereas a complaint (*Strafantrag*) formally requests or requires the opening of proceedings, in effect initiating the process. Minor offenses must be reported within a statutory time period to compel the initiation of proceedings.

There is a present controversy as to whether police and prosecutors are obliged to report a crime they have come across in their private lives; current case law acknowledges such an obligation for serious crimes, such as murder.

54 See *supra* note 49.

55 Eric Mathias, *The Balance of Power Between the Police and the Public Prosecutor*, in *EUROPEAN CRIMINAL PROCEDURES* (Mireille Delmas-Marty & J.R. Spencer eds., 2002), at 479; Code of Criminal Procedure, Art. 160.

56 Code of Criminal Procedure, Art. 160.

57 *Id.*

58 Police powers to investigate are laid out in the Code of Criminal Procedure, Art. 163.

independently,<sup>59</sup> particularly in less serious cases, and prosecutorial intervention is limited to a final review of the file.

The Prosecution Services have broad discretion in conducting investigations. Prosecutors decide on the individual steps to be taken and their sequence on the basis of personal convictions and taking into account standard investigative techniques and procedures. The prosecutor has the authority to compel attendance of witnesses and the accused, select experts, close an inquiry, and drop charges.

However, this discretion is not unlimited. Limitations on fundamental rights—such as pretrial detention (*Untersuchungshaft*), searches (*Durchsuchungen*), seizure of evidentiary material (*Beschlagnahme*), and violating the confidentiality of correspondence and telecommunications (*Beinträchtigung des Brief- und Fernmeldegeheimnisses*)—require mandatory judicial orders. As will be explained below, exceptions are made in emergency cases.

*Control of Ongoing Prosecution:* There are no examining magistrates in Germany, and judges are never responsible for the entire investigation. However, after receiving the charge and the case file from the prosecutor, the court may decide there is an insufficient factual or legal basis for the charge and request additional investigation by either the prosecutor or the police. A judge may also seek evidence on his or her own.

In the majority of cases, the court approves the charges and sets a trial date. Should the court refuse to approve the charge, the Prosecution may appeal; the decision on appeal is final. Even if it approves the charges and opens “main proceedings” (*Hauptverhandlung*), the court retains the right to request new evidence throughout the trial.

The prosecutor has broad powers to make motions during trial, which the court must decide. In the course of the trial, both prosecutor and defense may request additional investigation and procurement of additional evidence. They may also ask the judge to recuse him or herself for bias, though it is more common for a defense lawyer to make such a request.

*Post-Trial Functions:* Prosecution Services have responsibilities even after judgment is rendered. A special officer (*Rechtspfleger*) in each Prosecution Office enforces final judgments, including the collection of fines and confinement of individuals; this officer also monitors the enforcement of sentences to ensure they are actually served.<sup>60</sup> The Prosecution also submits recommendations when courts review requests for early release and clemency.

*Federal Prosecution Service:* The office of the Federal Prosecutor General is the only prosecution office at the federal level in Germany. Its criminal law functions include participation in proceedings before the Federal Supreme Court and the state Supreme

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<sup>59</sup> See Section 4.4 below.

<sup>60</sup> Code of Criminal Procedure, Art. 451. The Prosecution is only responsible for the enforcement of sentences against adults; enforcement of sentences concerning juveniles falls within the competence of judges specialized in dealing with youthful offenders (*Jugendrichter*).



Courts; prosecuting offenses against the internal or external security of the nation; and keeping central criminal law enforcement registers.

The Federal Prosecution Service appears in proceedings before the Federal Supreme Court in appeals of judgments from the Regional Courts (*Landgerichte*). In such cases, which generally involve serious crimes, federal prosecutors take the case over from the state Prosecution Service. The Federal Prosecution Service also brings cases on appeal from proceedings brought by the Federal Prosecution Service itself. Only a judgment on the law may be appealed before the Federal Supreme Court; no evidence is collected at this level of review, and the court is bound by the lower court's findings of fact.<sup>61</sup>

The Federal Prosecution Service also prosecutes serious offenses against the state, such as politically motivated crimes, terrorist attacks, high treason, espionage, and genocide, and in such cases the Service performs the full range of prosecutorial functions, including investigation. The Federal Prosecutor General may assign investigation or other specific tasks in any individual case to the Federal Office of Criminal Investigation (*Bundeskriminalamt*), or to the criminal investigation offices and police of the states; these agencies are under an obligation to carry out the duties assigned to them by the Federal Prosecutor General. In discharging the above function, the Federal Prosecution Service must first bring charges before the state Supreme Courts, as courts of first instance in federal cases.<sup>62</sup> It has no power, however, to prosecute before Regional or District Courts.

The Federal Prosecution Service is required to maintain and administer Germany's criminal law enforcement registers as part of the Central Federal Registry. These registers contain records of every conviction in German courts, both state and federal. The Prosecutor General has complete independence in administering the registers, the use of which is strictly regulated, and is responsible for determining, among other things, who has access to the registers under the law and for how long the names of convicted defendants are retained.

*Relations between the Federal and State Services:* In certain circumstances, the federal and state Prosecution Services may transfer control of cases between themselves, or the Federal Prosecutor General may resolve disputes between two states.

In the event of minor offenses and of listed criminal offenses, the Federal Prosecution Service refers the case to state prosecutors, unless there is a significant public interest or the involvement of the Federal Service is required for the sake of legal consistency.

Disputes over jurisdiction between prosecutors from different localities within one state are resolved by the state Prosecutor General; jurisdictional disputes between

61 Two types of appeals are possible in Germany: *Revision*, which is an appeal only on the law, and *Berufung*, which is an appeal on both fact and law, essentially requiring a new trial of the facts. The prosecution may appeal a verdict of innocence or a sentence it believes is too lenient.

62 Cases that at one time would have been brought before the Federal Supreme Court (*Bundesgerichtshof*, BGH) as the court of first instance (by federal prosecutors) are now begun before a state Supreme Court, to ensure the possibility of appeal. They are still federal cases and are brought by federal prosecutors. Such cases include treason and terrorism.



state prosecutors are resolved by the Federal Supreme Court. In the event of a dispute between the Federal Prosecution Service and a state Prosecution Service as to who should handle criminal proceedings, the Federal Prosecutor General resolves the dispute.<sup>63</sup> In criminal cases falling under the jurisdiction of a state Supreme Court as a first-instance court, prosecutorial functions are performed by the Federal Prosecutor General.

### 3.2. Relationship with the judge at the pre-trial stage

Although the prosecutor has the leading position in the pre-trial phase of criminal proceedings, the judge does have certain powers that limit the actions of the prosecutor. The prosecutor retains the power to initiate and direct the investigation; the powers of the court in the pre-trial process serve instead to guarantee basic rights, as an external monitor not directly involved in the investigation.

Prosecutors must seek judicial permission to impose coercive measures (*Eingriffsmassnahmen*) in the course of investigation; the judge ensures that a suspect's fundamental rights and freedoms are not improperly infringed. Judges can authorize measures limiting basic constitutional rights, personal liberty, freedom of movement, right to property, and inviolability of the home, under strictly defined conditions. When a request for a measure limiting basic rights is made, the case file is sent to the court for a decision, although investigation continues. Any measure limiting basic rights can be appealed by those affected, whether undertaken by a prosecutor on his own authority or ordered by a judge.<sup>64</sup> If submitting a request to a judge would risk loss of evidence through delay (*Gefahr im Verzug*), threatening the successful outcome of the investigation, the Prosecution may take necessary investigative action involving invasions of individual rights. In such cases, there will be mandatory *ex post* judicial review.

*Pre-Trial Detention:* Pre-trial detention is possible only where certain conditions are met: strong suspicion that a crime was committed (*dringender Tatverdacht*) and risk that the suspect might flee, hinder the investigation, or commit another crime. In addition, detention must not be disproportionate to the crime involved. Prosecutors may order provisional detention (*vorläufige Festnahme*) where incontestable information has been gathered that an offense has been committed and there is danger that the offender will flee.<sup>65</sup> Under the same conditions, the police may arrest a suspect on their own initiative and contact the Prosecution, normally also supplying the investigation file; the Prosecution then decides whether to release the suspect or to

63 GVG, Art. 142a(1). This issue has sparked frequent debate on, for example, whether a crime is politically motivated and thus concerns the entire country (in which case it would be a federal crime) or is a simple crime (and thus a state concern). An example in the experience of one of the authors of this Report involved prosecution of accomplices of the Basque terrorist group ETA. In that case, federal prosecutors refused to take the case, even though the author, at the time the state Chief Prosecutor, felt the prosecution went beyond the state's competence.

64 *Id.* (granting a right to appeal pre-trial detention at any time).

65 Code of Criminal Procedure, Art. 127.

file a written request, with grounds, for pre-trial detention. The detainee must immediately be brought before a pre-trial judge (*Haftrichter*), who in a reasoned opinion may revoke the detention as illegal or admit the action and impose an order for pre-trial detention (*Untersuchungshaft*). The Prosecution can appeal the judge's decision, and the detained suspect can appeal a detention order at any time (*Haftprüfung*).<sup>66</sup> (The same approach applies to other measures limiting fundamental rights.)

In addition, the state Supreme Court checks after six months to determine whether continued detention is justified or not.<sup>67</sup> The grounds for continued detention for more than six months are regulated and are very strictly interpreted by most state Supreme Courts. They are examined with particular care to ensure that the Prosecution and police are not at fault for delaying timely completion of the investigation. Should the court permit continued detention, it will thereafter review the detention every three months.<sup>68</sup>

*Other Surveillance Warrants:* Judges may grant warrants for electronic surveillance, including wiretapping and eavesdropping.<sup>69</sup> Such warrants can be granted only for a list of strictly enumerated crimes (*Katalogtaten*).<sup>70</sup> A warrant for surveillance may only last for four weeks, with possible extension. In emergency cases, the prosecutor may issue a temporary order for electronic surveillance, but a warrant must be obtained immediately after the fact.

Judges also issue warrants for search and seizure.<sup>71</sup> In emergency cases, either the prosecutor or investigative agents may carry out searches and seizures without a warrant, but one must be obtained immediately after the fact. Judges consider search and seizure measures only for their legality, not for appropriateness or necessity.<sup>72</sup> Prosecutors' requests for these measures must be based on detailed reasons; however, in contrast to arrest warrants, warrants for these measures tend to be easily granted. Also, German rules of evidence are permissive, and even evidence obtained in violation of procedural rules may be introduced at trial; as a result, investigators tend to seize far more documents than necessary in their searches.

As German judges are not investigating magistrates and do not conduct investigations, they do not grant warrants directing what evidence should be sought or indicating what additional information is required for a search warrant to be granted. This is entirely within the authority of the Prosecution. Thus if the Prosecution does not present sufficient evidence in support of its request for a warrant, it will simply be refused by the judge as not well founded.<sup>73</sup> A warrant does not oblige the prosecutor to take the steps described in it, but simply empowers the prosecutor to do so at his discretion.

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<sup>66</sup> Code of Criminal Procedure, Art. 117.

<sup>67</sup> Code of Criminal Procedure, Art. 121.

<sup>68</sup> Code of Criminal Procedure, Art. 122.

<sup>69</sup> Code of Criminal Procedure, Art. 100b, 100d.

<sup>70</sup> Code of Criminal Procedure, Art. 100a, 100c.

<sup>71</sup> Code of Criminal Procedure, Art. 98, 100.

<sup>72</sup> K. Amelung, *Rechtsschutz gegen strafprozessuale Grundrechtseingriffe* (1976), at 28 et seq.

<sup>73</sup> Roxin, *supra* note 40, at 61.

*Other Investigative Processes:* Although judges do have certain functions in the pre-trial stage, they are not technically participants in it. The judge cannot initiate proceedings or conduct investigations. However, certain investigative processes can be conducted before a judge. As part of the pre-trial procedure, witnesses, expert witnesses, and the accused can be questioned by a judge,<sup>74</sup> who may also order and lead an inspection of a crime site.<sup>75</sup> The purpose of this procedure is to ensure that crucial evidence is collected during the pre-trial procedure, if there is a risk it might be lost for trial, and so the judge's powers are defined as powers to secure evidence for the trial (*Beweissicherung*).<sup>76</sup> Such records of interrogations and site inspections by the judge can be introduced as documentary evidence at trial.

### 3.3. Powers outside the criminal justice system

The Prosecution Services have no functions or powers outside the criminal justice system; they do not participate in any civil or administrative proceedings.

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## IV. Relationship of the Public Prosecution Service to Other Organs of the State

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### 4.1. The constitutional location of the public prosecution service

The Federal Republic of Germany is a constitutional parliamentary democracy, consisting of 16 states (*Länder*), each with its own constitution, laws, and governance structures. The federal Constitution (*Grundgesetz*) has primacy, but each state has considerable authority over its own affairs.

The federal President is elected by the Federal Assembly (*Bundesversammlung*). The federal government consists of the Chancellor (*Bundeskanzler*) and other ministers, elected by the lower house of Parliament (*Bundestag*). The states have separate executives. The federal parliament is bicameral, consisting of the popularly elected *Bundestag* and the upper house (*Bundesrat*) representing the states. State parliaments (*Landtage*) are elected by citizens of the respective states. **Judicial authority is vested** in federal and state courts. Federal courts function only as courts of last resort.

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74 Code of Criminal Procedure, Art. 133, 162, 169.

75 Code of Criminal Procedure, Art. 168.

76 Werner Beulke, *Der Verteidiger im Strafverfahren* (1980), at 31.

The Federal Constitutional Court decides only constitutional questions; the Federal Supreme Court is a final court of appeals in criminal and civil matters.

There are Prosecution Services at both the federal and state levels. The exact location of the Prosecution Services within the constitutional structures of the state—whether as part of the executive, the judiciary, or in an intermediate position—is subject to debate among legal scholars. The federal and state constitutions contain no provisions regarding the Prosecution Service. The authority exercised by federal and state Ministers of Justice over prosecutors, the hierarchical nature of prosecution offices, and the ability of senior prosecutors to give instructions to lower-ranking prosecutors lead some scholars to describe the Prosecution Service as part of the executive.<sup>77</sup> At the same time, the existence of statutory limitations on the ability of political officials and senior prosecutors to instruct lower-ranking prosecutors, and prosecutors' duty of objectivity<sup>78</sup> and ability to terminate criminal proceedings,<sup>79</sup> lead others to describe the prosecution as a separate organ of the criminal justice system (*Organ der Rechtspflege*).<sup>80</sup> Some scholars believe that the prosecution occupies an intermediate position between the executive and judiciary;<sup>81</sup> however, the Constitution does not envisage the existence of any "intermediate" branch of the state.

The prevailing view, at least among practitioners, is that the Prosecution Services are criminal justice authorities within the executive whose individual agents exercise their power in non-political fashion.

The Prosecution Services have a monopoly on the prosecution of crime (except for the limited option of private prosecution, discussed above). Prosecutors also exercise control over the behavior of investigative authorities, including monitoring for abuse of powers. Prosecutors are not considered a party at trial, as the defendant is; rather, they present charges on behalf of the state and are expected to exercise their powers objectively and impartially.<sup>82</sup>

## 4.2. Relations with the legislature

The legislatures do not exercise direct formal control over the Prosecution Services and have little direct influence on their work; formally, the principle of separation of powers prevents them even from making recommendations concerning their performance in specific proceedings. However, legislatures can influence the Prosecution Services through legislation altering their jurisdiction, competence, and working conditions, and through the budgetary process. They can also exercise indirect control through mechanisms for monitoring the executive, in particular the Ministers of

77 See, e.g., Lutz Meyer-Goßner, *Kommentar zur Strafprozessordnung* (2006), note 5 to GVG, Art. 141

78 Code of Criminal Procedure, Art. 160.

79 Code of Criminal Procedure, Art. 153 et seq.

80 See, e.g., Werner Beulke, *Strafprozessrecht* (2006), at marginal no. 88.

81 See, e.g., H.H. Kuehne, *Strafprozesslehre* (1993), **marginal no.61**; Karl Peters, *Strafprozess. Ein Lehrbuch* (1985), § 23II.

82 See Huber, *supra* note 39.

Justice. Such oversight may be exerted in the form of written **questions and inquiries** to the government, which occur with relative frequency.

Questions from legislators concerning the Prosecution Services must be addressed to the Ministers of Justice, not the Prosecutors General. In practice, however, it is possible for the legislature to investigate the work of the Prosecution Service in the course of considering other matters. For example, in investigating a political scandal, legislatures may—and frequently do—also touch upon the performance of the Prosecution Service in a specific case.<sup>83</sup> A legislative committee could interrogate the prosecutor directly in charge of such a case, or the Prosecutor General, as witnesses,<sup>84</sup> or could even review documents pertaining to an ongoing investigation. If the Prosecution objects to providing such documents to the committee, the committee may obtain a court order giving it access to the documents. To date, no prosecutor has ever been ordered by a judge to appear as a witness before a commission of inquiry. However, there have been cases in which court orders have been obtained requiring prosecutors to submit case materials to such a commission.

#### **4.3. Relations with the executive**

As noted above, Prosecution Services are functionally part of the executive, answering to the Ministers of Justice. However, relations between the prosecution and the political executive are not always smooth. In particular, representatives of the Prosecution Services have been arguing for many years, unsuccessfully, though lately very persistently, for the abolition of the Ministers' power to issue instructions in individual cases.<sup>85</sup>

The executive has influence over the prosecution in a number of ways. The executives appoint the Prosecutors General. In general, Ministers of Justice can give instructions to the Prosecution Services with the purpose of achieving uniform law enforcement, subject only to the limits inherent in the principle of compulsory prosecution (discussed above).<sup>86</sup> Federal and state Ministers of Justice issue joint guidelines to define policies on criminal law enforcement; these guidelines are published and issued

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83 Prosecutors are frequently asked by the opposition whether the government exercised an influence on particular prosecutorial decisions and whether the prosecutor received written or oral instructions in regard to such decisions. As an example of the type of influence legislatures seek to uncover, in an investigation of a Minister of the Interior for passing on information from the police, one of the authors of this report, a state Chief Prosecutor at the time, was asked by the Justice Minister for information on the case. Although the Minister of Justice had the right to be informed about the case, it would have appeared to be undue influence, and the Minister ultimately was convinced to forego the information.

84 One of the authors of this report, while serving as state chief prosecutor in Hesse, was questioned by the Federal Parliament and the Hesse state parliament, both of which were investigating whether or not either the Minister of Justice of Hesse or the Prosecutor General had influenced an investigation into illegal contributions to the Christian Democratic Union.

85 See, e.g., Werner Röth, *Ein klassischer Fall von Befangenheit*, FRANKFURTER ALLGEMEINE ZEITUNG, Mar. 20, 2000, at 12 (advocating replacing Minister of Justice's right of instruction with state prosecutor generals' right to appeal a ministerial instruction to the state Supreme Court).

86 Prosecutors can be subject to criminal liability for violating this principle. See Section 1 above.

to each prosecutor. Legally, however, Ministers of Justice may also issue instructions regarding individual cases.

The power of the Ministers of Justice to give instructions to prosecutors in individual cases and in general has been the subject of debate in Germany. Prosecutors have raised **concerns about the risk of abuse of such powers for political purposes and** have demanded their repeal, or at least restriction and formal regulation.<sup>87</sup> They have called at a minimum for a requirement that such instructions be made in writing, which would lessen the likelihood of informal government pressure on prosecutors. However, there have been only a few isolated cases of a Minister providing mandatory instructions to a Prosecutor General, and no known cases of abuse for political reasons—in part a product, perhaps, of strong democratic traditions and the public's high level of sensitivity towards any abuse of power.

For their part, prosecutors cannot issue instructions to any agency within the executive, except for internal instructions to investigative officers regarding criminal procedure.<sup>88</sup> Notwithstanding, **all state and federal authorities have a duty to assist any Prosecution Services in the exercise of their functions by, for example answering questions or providing access to documents. Prosecutors can request a judicial seizure order to compel cooperation.**

The Ministers of Justice can also require information from the Prosecution Services. The Prosecution Services must inform the Ministers of all pending proceedings,<sup>89</sup> and the Ministers issues guidelines specifying in what cases and in what form the Prosecution Services should report. In practice, such reporting mainly involves more significant cases, particularly those with political implications, rather than common crimes. Prosecutors must also submit regular activities reports to their state Ministers through their state Prosecutors General; the Ministers can incorporate reports from different offices into a joint report. Such reports inform the Ministries of problems and may provide them with the justification to issue new guidelines.<sup>90</sup> In exceptional circumstances, a Minister of Justice may ask individual Prosecution Services directly for reports, which can be experienced as external political pressure. Prosecutors generally oppose this practice, preferring that inquiries be made through normal channels. In practice, however, the Minister of Justice seldom intervenes in individual cases.

The executive's involvement in the budget process is explained above. The prosecution's dependence on the executive for financial support theoretically permits indirect influence, but this is not a significant factor in the prosecution's work.

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87 See *supra*, note 85.

88 These investigative offices are experienced police officers who are legally empowered to receive direct instructions from the prosecution. See Section 3 above.

89 See, e.g., *Regulation of the Hesse Ministry of Justice and similar regulations in other states.*

90 For example, reports may reveal the development of a particular category of crime that requires new training programs or special expertise.

#### 4.4. Relations with the police and other investigative authorities

While the Prosecution Services and the police forces both answer to the executive, they are administratively separate. The police forces are subordinate to the Ministers of the Interior, while the Prosecution Services are under the Ministers of Justice. This places an institutional limit on prosecutors' authority over the police; nonetheless, Prosecution Services have considerable authority over the conduct of police investigations. Prosecutors are the leaders of the investigation and pre-trial and investigative proceedings, and are also responsible for ensuring that all proceedings are carried out in a lawful and just manner, in full compliance with the rule of law. This means they have a formal and practical responsibility to both direct and monitor the work of the police.

The Prosecution Services can conduct preliminary investigations in criminal cases;<sup>91</sup> prosecutors do not exercise those powers directly, however, but rather work with and give instructions to the police authorities (though not to individual officers, except to specially-determined investigative officers). Most criminal investigation is carried out by the state police forces or, at the federal level, by the Federal Criminal Investigation Office (*Bundeskriminalamt*), which is competent to investigate criminal activities covering the territories of more than one state as well as international crime.<sup>92</sup>

In addition to their role in investigating crime, the police are also responsible for maintenance of public order. A prosecutor may give the police mandatory instructions only in connection with their investigative role.<sup>93</sup> Police who are designated "investigative officers"<sup>94</sup> have detective powers in the preliminary investigation of criminal cases<sup>95</sup> and are under a duty to obey prosecutors' requests related to specific investigations.<sup>96</sup> In general, prosecutors do not communicate directly with individual

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91 Code of Criminal Procedure, Art. 160.

92 The Federal Criminal Investigation Office (FCIO) is empowered to collect and analyze all crime-related information; it is responsible for crime statistics. The FCIO prepares crime surveys, research, and expert assessments at the request of all Prosecution Services. In limited cases, the FCIO may also take over an individual investigation from the competent state police force. These powers are limited to cases of international crime, and offenses against members of federal bodies and foreign diplomatic agencies. The Federal Intelligence Agency (*Bundesnachrichtendienst*), created under Article 87 of the federal Constitution, is an intelligence service empowered to collect domestic and foreign intelligence, but it is not a law enforcement agency and has no power to arrest or prosecute.

93 Code of Criminal Procedure, Art. 160; GVG, Art. 152.

94 Investigative officers include not only police detectives, but also bailiffs and staff of other ministries with specific regulatory powers (over hunting or forestry, for example), who have been appointed to perform those functions. See, e.g., *Verordnung über die Hilfsbeamten der Staatsanwaltschaft* [Bavarian Regulations on Investigative Officers]. See also Claus Roxin, *supra* note 40, at 55 et seq.

95 All police officers can make arrests or carry out identity checks, but only investigative officers possess further powers to investigate. Police officers who are not investigative officers are also under a duty to execute prosecutorial requests, such as those related to summoning and arrest of offenders who must be brought before the authorities.

96 Code of Criminal Procedure, Art. 161. The use of the term "requests" (*Ersuchen*) emphasizes that the officers are not administratively subordinate to the prosecutor giving instructions, but rather are subject to a separate duty identified in the Code of Criminal Procedure to execute prosecutorial instructions in specific cases.



police officers, but rather send requests to the police, who then assign individual officers to specific tasks.

Thus although the police are administratively separate, they are functionally subordinate to the Prosecution Services in matters of investigation (indeed, where the activities of the police in crime prevention and crime investigation may overlap, these may also be overseen by a prosecutor if the investigative aspect is more pronounced.) The police are commonly described as the “extended arm of the Prosecution” (*verlängerter Arm der Staatsanwaltschaft*). The file assembled by police in the course of investigation must be submitted to the Prosecution. The police have no power to close an investigation after it has been opened; rather, they are under a duty to send the file to the Prosecution, which alone decides whether to file charges in court or to close the case.

Prosecutors may also conduct their own investigations, although this is generally done in coordination with the police. For example, the search of company premises, government offices, and banks is usually done after detailed planning with criminal investigators and the tax authorities<sup>97</sup> in a procedure overseen by prosecutors. In cases of electronic surveillance, the role of the police is generally technical in nature. Prosecutors submit their requests for authorization of wiretapping to the court, and then pass on the authorization to the police for technical implementation. Once again, it is the prosecutors who decide whether the measures in question are extended or terminated. At the local level, it is very common for senior members of the police and prosecution to hold regular in-depth discussions, with the results reported to the Prosecutor General.

In theory, the police have no statutory mandate to conduct extended investigations independent of the Prosecution Service. The police may proceed on their own initiative only during the initial stages of an investigation when urgent investigative actions are needed; thereafter, control over criminal proceedings should be handed over to the competent prosecutor, who is supposed to assume administration of the preliminary investigation.

In practice, however, the police often exercise considerably more control over the investigative process than the theory and formal rules suggest, and more than is exercised by the Prosecution Service.<sup>98</sup> The residual power the police in fact exercise stems from their ability to withhold information from the Prosecution Services, and prosecutors’ own acquiescence in police control of investigation.<sup>99</sup> Prosecutors rarely participate in viewing the crime scene<sup>100</sup> or actively supervise the police, who have considerably more personnel and technical equipment at their disposal.

<sup>97</sup> See below, this section.

<sup>98</sup> See, e.g., Werner Bottke, *Polizeiliche Ermittlungsarbeit und Legalitätsprinzip*, in GEDÄCHTNISCHRIFT FÜR KARLHEINZ MEYER (1990), at 37; Mathias, *supra* note 55, at 471 (describing the Prosecution Service as merely “the authority that registers” the work done by the police).

<sup>99</sup> Mathias, *supra* note 55, at 472.

<sup>100</sup> K.H. Goessel, *Überlegung über die Stellung der Staatsanwaltschaft im rechtsstaatlichen Strafverfahren und über ihr Verhältnis zur Polizei*, GOLTDAMMER’S ARCHIV FÜR STRAFRECHT (1980), at 347.

The relative roles of the police and prosecutors depend on the nature of the crime; the more serious a case is, the earlier the Prosecution will likely be involved. In particularly serious matters, such as political corruption, prosecutors may carry out the investigation entirely on their own, and will almost certainly question the key witnesses and the accused. Similarly, in the investigation of economic crimes, expert prosecutors normally carry out the major part of the investigation, with the role of the police limited to their more typical tasks (interrogating suspects, examining the crime scene, etc.). In minor cases, however, the police normally conduct the entire investigation and only submit it to the Prosecution at the point at which charges would have to be brought; thus the Prosecution has no involvement in the investigation at all. This state of affairs has been criticized by legal scholars, who argue that it gives the police space for a growing number of discretionary, uncontrolled acts.<sup>101</sup>

In the past, autonomous police investigation was confined largely to what was known as classic crime. In recent years, however, police have grown increasingly specialized in fighting more modern types of crime, such as cybercrime, and have set up their own investigative units. This has further reduced the extent of prosecutorial control and oversight of police work. To exercise proper oversight, prosecutors would need to be trained in these areas, but this is only possible to a limited extent due to staffing limitations.

The police and Prosecution Services often have a difficult working relationship, which may result in part from their differing core functions. The police's view of its role "is to find the guilty, not the innocent,"<sup>102</sup> while the Prosecution is expected to ensure that the investigation adheres to proper criminal procedure, with an eye to a subsequent, successful conviction. For example, the relatively limited use of pre-trial detention by prosecutors<sup>103</sup> creates some tension with the police, who complain that they must search for the same individuals again and again after they have been released.<sup>104</sup>

Because police are more likely to be interested in successful investigation than in legal niceties, the increased police control of investigations has been considered problematic; in an attempt to ameliorate the problem, police today are required to receive far more intensive training in legal matters than was the case in the past.

Officers from other executive agencies—such as financial, tax, forestry, hunting, and fishery authorities—can also investigate criminal offenses, acting as investigative officers. Investigations are only one aspect of their assignments, usually a significantly smaller one.

The tax authorities (*Steuerbehörden*) normally take over investigations from the general financial authorities if there is reasonable suspicion of a tax offense, although when the case concerns only tax violations, the tax authorities investigate on their

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101 See, e.g., Gerhard Fezer, *Strafprozessrecht I und II* (1986), marginal no.86; *Festschrift für Karl Schäfer zum 80. Geburtstag* (1979).

102 J. L. Sauron, *Droits penal, bilan critique* (1990), at 43.

103 See Section 3.2 above.

104 Based on author's personal experience.

own. Upon concluding the investigation, however, they submit the investigation to the Prosecution for a decision on whether to prosecute or not. In cases of serious tax offenses, the Prosecution is normally involved in the investigation from an earlier stage, often from its initiation.

#### 4.5. Relations with the judiciary

As already noted, the Prosecution Service is not part of the judicial branch. The Prosecution is independent of the courts in the discharge of its functions.<sup>105</sup> Likewise, prosecutors do not have powers to take action within the competence of the courts; it would be practically impossible for prosecutors to exercise any control over judges' work. The Prosecution and the courts generally have separate career paths, administrations, and budgets, although in some states, the state Supreme Court and the Prosecutor General's office may share administrative staff and costs.

There is a clear difference in the independence of judges and prosecutors from their respective superiors. Judges are absolutely independent from their superiors in deciding cases, and cannot be transferred to other courts without their agreement.<sup>106</sup> Prosecutors, on the other hand, are obliged to follow instructions from their superiors and, like other civil servants, can be transferred against their will to other offices. In practice, however, this does not often happen; most commonly, a prosecutor need not change offices in his entire career if he does not wish to.

Judges and prosecutors generally enjoy close social and professional contacts. Indeed, in several southern German states, judges and prosecutors are required to move regularly back and forth between prosecutorial and judicial offices, even at the highest levels of both professions. Promotions depend on familiarity with both career paths. This requirement does not exist in northern German states, where such movement is much less common. Such a move does not always contribute to greater efficiency: if a prosecutor hoping for a promotion takes a position in a civil court, for example, his criminal law background will be of little help, and he will essentially return to the status of a beginner. Nevertheless, this movement between professions is considered important in helping judges and prosecutors better understand each others' work. It also helps both services retain a degree of flexibility.

Salaries of prosecutors and judges at the same level of jurisdiction are equivalent;<sup>107</sup> depending on the size of the court or prosecution office, however, salaries of the heads of courts or prosecution offices may differ.

<sup>105</sup> Judicial Act, Art. 150.

<sup>106</sup> This is determined by the guarantees of judicial independence in Articles 97 and 98 of the federal Constitution and in the *Richtergesetze* [Judicial Acts] of the various states.

<sup>107</sup> This can be found in the federal and state-level *Besoldungsgesetze für Richter und Staatsanwälte* [Acts on Salaries for Judges and Prosecutors].

## V. Information Control

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Polls show that the public generally approves of the work of the Prosecution. The major public criticism does not concern either qualifications or charging decisions, but rather the length of proceedings.<sup>108</sup>

*Media Relations:* Relations with the media constitutes perhaps the most difficult task confronting the Prosecution Services. The Prosecution has an interest in informing the public when it has certain, well-documented evidence of a crime, preferably at a later stage in the investigation. The media, by contrast, are interested in publishing information as soon as possible, which often leads to the publication of insufficiently substantiated information. In addition, the mistakes made by state authorities, including prosecutors, police, and judicial institutions, are often emphasized, in ways that prosecutors feel is sensationalized.

At the same time, all government agencies are under an obligation to provide full information to the media,<sup>109</sup> and as a consequence the Prosecution bears the burden of justifying any withholding of information. The media often complain to the Ministers of Justice about lack of informational access; this can lead to conflict between the Ministers—who are political officials—and the Prosecution as to the way the press should receive certain information.

Every prosecution office has a press officer who is in charge of press contacts. In smaller offices, the task is often performed by the Chief Prosecutor who heads the office, but in larger offices a professional usually performs this function. Prosecutors General adopt general instructions (*Rundverfügungen*) that provide internal guidelines for working with the media.<sup>110</sup> For more serious cases, a press release is usually prepared, which is given to accredited journalists; for other cases, the press officer provides information orally. In very important cases, where media interest goes beyond the local region, the head of the Prosecution Office, the department head, and the prosecutor in charge will take part in the press conference along with the press officer; in some cases, the head or other representative of the police may also be present. Particular attention is given to treating all media outlets on an equal footing and not giving preference to any one.

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108 See, e.g., a survey sponsored by the Berlin city government: Senatsverwaltung für Justiz Berlin, *Bürger und Justiz–Berlin 2004*, PRESSEMITTEILUNG, July 19, 2004, available at <http://www.berlin.de/sen/justiz/presse/archiv/20040719.21501.html>.

109 This obligation is limited to information that would not compromise an ongoing investigation. For example, the law on the press in Hesse provides that “Government agencies shall provide to the press the information requested. They can refuse to provide such information only where certain information might . . . hinder the completion of . . . the criminal investigation.” *Hessisches Pressegesetz* [Hesse Press Act], Art. 3(1).

110 See, e.g., *Rundverfügung des Generalstaatsanwalts Frankfurt über die Zusammenarbeit der Staatsanwaltschaften mit den Medien* [General Instruction from the Frankfurt Prosecutor General on Cooperation between the Public Prosecutors and the Media], Oct. 1995 (internal regulation).

Since the investigation is always controlled by the Prosecution and not by the police, the police may only make statements about an investigation with the consent of the Prosecution. In practice, this is one of the Prosecution's most important powers with regard to the police. If the media attempt to gain information from the police, the police must inform the prosecutor, as they are required to keep the Prosecution informed of all important matters regarding the investigation. The Prosecution can also authorize the police to make statements about the case. If a case does not raise particularly complicated issues, the police have the right to inform the press without prior consent of the Prosecution.<sup>111</sup> The types of crime and situations upon which police may comment are agreed upon between the head of the prosecution office (Chief Prosecutor) and the police chief.

If the media make factual errors in reporting on a case, German press law allows the Prosecution to go to court to demand a retraction. This is not a common solution, as such a forced retraction can be couched in language that does not aid the prosecutors' cause.<sup>112</sup> Prosecutors may also ask the German Press Council, a professional media organization, to reprimand or expel a member. In general, the Prosecution is in a relatively weak position in relation to the press. Prosecutors cannot retaliate against false media statements by withholding information from the media, as this is forbidden by state and federal media laws.

There is no evidence that the media unduly influences prosecutorial decisions, at least directly. No cases have been reported of prosecutors altering their decisions because of media attention, in part, perhaps, because of the strong sense of professionalism in the Prosecution Service. However, media reporting can influence the atmosphere in more subtle ways. Extensive reporting on a case, for example, can lead to harsher treatment of the suspect.

The media can also take on a positive role in guarding the Prosecution from undue political influence. When the media suspect such interference, they generally take the side of the Prosecution.

In general, German data protection laws forbid revealing a suspect or known perpetrator's full name (except for well-known public figures); children must be kept entirely anonymous. For the same reason, prosecutors must be cautious about revealing ethnicity and other personal details. This does not prevent media from obtaining such information, though they are also cautious about revealing certain details. If they publish false information, they may be held liable for slander under Germany's relatively strict libel laws.

It is common for prosecutors to emphasize in public statements that a suspect is innocent until proven guilty, and that the case has not yet been decided.

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111 In most states, prosecution offices enter into agreements to this effect with the police. They can be rescinded at any time.

112 One of the authors, a former Chief Prosecutor, took this action only when necessary to protect the reputation of a prosecutor in his office.

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## VI. Statistics

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It is difficult to compare statistics from Germany with those of other countries. German prosecutors' offices handle many more cases in total than many other European countries, because there is no police procedure; all cases must go through the prosecutor's office. In other countries, if the identity of the perpetrator cannot be determined, a case will never leave the police. In Germany, even cases with unidentified perpetrators are sent to the prosecutor's office for review and, if necessary, further investigation. This is a means of monitoring police behavior.

These statistics mean that Germany has a much higher rate of unsolved cases, but this cannot be taken to mean that the Prosecution Services are less efficient. Germany does not measure efficiency through such statistics. Efficiency is measured internally according to the duration of cases; that is, by recording how many proceedings take three, six or nine months. These are purely internal statistics that are kept but not publicized. They are useful to office heads in determining the reasons for the length of cases. Additional statistics kept by states measure the hours worked by prosecutors, in order to make determinations regarding resource allocation. Yet these statistics, too, say nothing about the complexity of the cases involved.

The Prosecutor General may decide to permit a researcher access to case files and statistics, as long as he agrees to keep them anonymous and comply with data protection laws.

### Basic Statistics, 2003 (representative for later years as well):

Cases open at beginning of year: **649,604**

New cases: **4,794,452**

Closed cases: **4,766,070**

Cases open at end of year: **677,986**

Cases ending with charge: **12 %**

Cases ended by penal order (*Strafbefehl*) : **12.7 %**

Cases ended through conditional termination: **5.6 %**

Cases closed without conditions: **21 %**

#### *By number of people:*

Number of people investigated: **5,624,822**

Number of people charged: **674,136**

Persons for whom penal orders have been applied: **619,827**

Persons whose cases were ended through conditional termination: **279,096**

Persons whose cases were closed without conditions: **approx. 900,000**

Persons whose cases were closed for lack of evidence: **approx. 1,400,000**

*Length of proceedings:*

Closed within a month: **61 %**

Closed in more than 36 months: **1.9 %**

Source: Statistisches Bundesamt, Statistik Rechtspflege, Fachbereich F10.



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# Report on the Public Prosecution in Hungary

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Endre Bócz



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## **I. General Issues**

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The strength of the Hungarian system lies in the centralized organization of the Prosecution Service, which can guarantee uniform interpretation of the law and a uniform prosecution policy. A further advantage may be seen as the Prosecution Service's freedom from direct political influence. This, however, may also be viewed as a disadvantage. To explain this, it is necessary to refer to the history of the Prosecution Service.

The Royal Prosecution Service of Hungary was established in 1872 and resembled similar continental European services, following the French (Napoleonic) model; it was subordinated to the government via the Minister of Justice. Even during the parliamentary debates on the draft of that 1872 Act, however, many MPs emphasized that the public prosecution service should not be subordinate to the government, because any government is apt to misuse such an instrument.

In 1953, the Prosecution Service was changed to conform to the "socialist" model of a prosecution service, invented in 1936 by Stalin and described in the Constitution of the USSR (from which the arrangement was copied). It was a centralized hierarchical organization, independent of the government and subordinated to the Parliament—but both Parliament and the government were directed by the central organs of the Hungarian Socialist Workers' Party.

It is common knowledge that between 1949 (the year of the communist take-over) and 1956, even local party leaders gave direct instructions to local prosecutors and judges. After the revolution of 1956, this possibility was eliminated, though the influence of the central Party leadership was maintained. In a "top secret" general instruction, the Prosecutor General ordered that any attempt at external influence on prosecutorial matters be reported to him; at the same time, however, a sub-department of the Office of the Central Committee of the Hungarian Socialist Workers' Party was charged with exerting "party direction and supervision" over the administration of justice, meaning courts, prosecution, and related matters.

In the late 1980s, the staff of the justice administration and the prosecution service consisted mainly of relatively young people. They had no personal experience of the 1950s, when the famous show trials took place, but had heard of them, because they were commonly known and were at the same time overtly labeled "breaches of socialist legality." Some of the organizers of these trials were even punished for abuse of official power.

Debates took place in Hungary in the late 1980s on the draft of a new constitution. In the course of this preparatory work, the constitutional status of the prosecution

service was heavily criticized as a “Stalinist invention.” A draft constitution was published with two other proposals regarding the transformation of the prosecution service, both of them subordinating it to the government via the Minister of Justice. The young staff of the service at the same time became aware of the role that direct political influence had played in the show trials. They believed that, were the prosecution service to be made answerable to the Minister of Justice (a politician), the possibility of direct political influence would be reestablished. Thus they strongly opposed relinquishing the Prosecution Service’s independence. The political forces discussing changes in the political system wanted to postpone the reorganization of the prosecution, so it was maintained in its existing state. Changing the Constitution requires a two-thirds majority in Parliament, and neither now nor in the foreseeable future is there likely to be such broad agreement on this issue.

The first Prosecutor General after the change in the system in 1990 was elected with an overwhelming majority, so he had firm legitimacy and was able to handle problems as legal issues, without getting involved in political debates. He resigned in 2000, and his successor was elected with only 55 percent of the votes. He has been criticized by the other political forces as a “party soldier serving as prosecutor general.” In 2002, the former opposition took over the government. The Prosecutor General was heavily attacked in Parliament as well as in the papers, because the newly elected government initiated investigations against its predecessors for misusing official powers and lavishly spending public money—but all these investigations ran aground. The cases were dismissed either on the instructions of the prosecution or by the prosecution itself, decisions attributed to the Prosecutor General’s political bias. Thus a weakness of the Hungarian constitutional arrangement is the possibility of electing a prosecutor general without broad consensus. Other officers—such as the Chief Justice and the Chief Auditor—are elected by a two-thirds majority; in regard to the Prosecutor General, this was not considered important, because politicians thought the entire prosecution system would soon be transformed.

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## II. Structure and Organization of the Public Prosecution Service

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### 2.1. Internal structure

The Prosecution Service consists of national, regional, county, and local prosecution offices on four levels;<sup>1</sup> in general, these offices track the organization of the courts.<sup>2</sup> There are 148 prosecution offices, as follows, with senior staff:<sup>3</sup>

- ▶ a Prosecutor General's office at the national level, with 112 prosecutors;
- ▶ three Deputy Prosecutors General, including the Chief Military Prosecutor;
- ▶ five Chief Appellate Prosecutors' offices at the regional level, with 33 prosecutors;
- ▶ twenty Chief Prosecutors' offices at the county and Budapest level, with 428 prosecutors;
- ▶ 116 city and district prosecutors' offices at the local level, with 807 prosecutors<sup>4</sup>;
- ▶ a Military Prosecution Service, with 60 prosecutors;<sup>5</sup> and
- ▶ senior administrative staff.

Each prosecution office is headed by a prosecutor of the applicable rank: Prosecutor General, Chief Appellate Prosecutor, Chief Prosecutor, head of a division or head of a department, director of local prosecution office, etc.<sup>6</sup> Office heads are included above in the numbers of prosecutors at each level.

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1 Act V of 1972: *A Magyar Köztársaság ügyészségéről* [On Public Prosecution Service of the Hungarian Republic] (as amended), Art. 18.

2 During the Communist period there were only three levels of courts. A regional, appellate level was reintroduced on October 1, 1997. After some delays, all five regional appellate courts are now functioning; each has jurisdiction over 3 to 5 counties.

3 See Act LXXX of 1994: *Az ügyészségi szolgálati viszonyról és az ügyészségi adatkezelésről* [On Service Relationships in the Public Prosecution Service and on Prosecutorial Data Handling] [hereinafter Act LXXX On Service Relationships].

4 In Budapest, these offices are called "district prosecution offices," while in the rest of the country they are known as "city prosecution offices" and referred to officially as "local prosecution offices." Any reference to "local prosecution offices" refers to both city and district offices. The head of a local prosecution office is the director of the district (or city) prosecution office (*kerületi/városi vezető ügyész*), but may be referred to as the district or city prosecutor; ordinary public prosecutors are referred to as prosecutors in the district or city prosecution office. See Act V of 1972 On Public Prosecution Service of the Hungarian Republic, Art. 18(1)(d), 21(1).

5 Information provided by József Stauber, Head of Branch in the Prosecutor General's Office, in his Letter No. Ig. 757/2004./1-I. Legf. Ü (December 21, 2004).

6 These are known as "leading positions" in the prosecution service. Some are referred to as "higher leading positions." This distinction is significant when discussing appointments or promotion to higher ranks or disciplinary responsibility.

Some units in the Prosecutor General's office as well as in the Chief Prosecutors' offices are headed by other specialists, such as experts on the economy, finance, bookkeeping, data-processing, statistics, etc. Most such units operate within the framework of the Prosecutor General's office, but at each Chief Prosecutor's office (in counties and in Budapest) there is an organizational unit (usually called a group, but called a department in Budapest) to handle finances, procurement, and maintenance of buildings, cars, and the like. At each level, someone must also keep criminal statistics and maintain the information system. They are usually on the Chief Prosecutor's staff (in Budapest, on the Secretariat's).

*National and Appellate Offices:* At the national level, the Prosecutor General's office is separate and independent and includes several bureaus, divisions and independent departments supervised by the Prosecutor General or by one of his three deputies: one for criminal law, one for civil and administrative law, and the Chief Military Prosecutor, who is the head of the Military Prosecution Service.<sup>7</sup> The independent departments are directly supervised by a Deputy Prosecutor General.

The Division for Review of (Criminal) Investigations and Preparation of Commitment to Courts of Law and the Division on Trial Matters are the authorities in criminal law, and the divisions on Administrative Law and Civil Law are the authorities in their respective fields.

Each of these divisions of the Prosecutor General's office analyzes the work and experience of the prosecutorial organization to identify theoretical problems in their respective fields, with a view to finding ways of improving the practice of the subordinate prosecution offices. Possible measures include legislation proposed to the legislature by the Prosecutor General (*via* the Minister of Justice and government),<sup>8</sup> or motions to the Supreme Court in individual cases or in special matters,<sup>9</sup> or general instructions, guidelines or memoranda for the Public Prosecution Service on practical matters.<sup>10</sup> They may also concern a particular aspect of the work of a specific prosecutorial body or office as the result of a "general review," discussed below.<sup>11</sup> The effect of the work of these divisions is felt in the activities of the county/municipal and local prosecution offices.

The Independent Department on Review of Legality in Execution of Punishments and Protection of Rights carries out its prosecutorial function only in the Prosecutor General's office and at the county level. The overwhelming majority of its tasks occur nationally, because the prison administration is centralized at the national level.

As a result of the centralized structure of the Prosecution Service, administrative and financial management is generally handled by the Prosecutor General's office.

<sup>7</sup> See 25/2003 (ÜK.12) LÜ, General Instruction by the Prosecutor General: *A Magyar Köztársaság Ügyészsége szervezetéről és működéséről* [On the Organization and Operation of the Public Prosecution Service of the Hungarian Republic] [hereinafter 25/2003 (ÜK.12) LÜ, *General Instruction*], Art. 9.

<sup>8</sup> Act V of 1972 On Public Prosecution Service of the Hungarian Republic, Art. 5(2)(b) and (c).

<sup>9</sup> Act V of 1972 On Public Prosecution Service of the Hungarian Republic, Art. 5(2)(f) and (g).

<sup>10</sup> 25/2003 (ÜK.12) LÜ, General Instruction, Art. 27(2)(a) and (c).

<sup>11</sup> 25/2003 (ÜK.12) LÜ, General Instruction, Art. 28(1). On "general reviews" *see id.*, Art. 31.

Regional and local offices deal mainly with tasks of very local interest; otherwise, they submit initiatives, requests, proposals etc. concerning general administration and financial issues to the Prosecutor General's office.

The Prosecutor General or, under his authority, his deputies or other senior staff take the measures and make the decisions necessary to control and direct the activity of the entire Service.<sup>12</sup> Some matters are the Prosecutor General's personal responsibility,<sup>13</sup> although the documents concerning such decisions are prepared by his office.

In order to direct the activity of the Prosecution Service, the Prosecutor General must be aware of the theoretical and practical problems the Service faces. By monitoring actual activity, analyzing practice, identifying practical problems, and comparing possible solutions with the principles of the law, the office helps to familiarize him with these problems.

As a higher-ranking office, the Prosecutor General's office is entitled to monitor and review any case in any office within the Prosecution Service, either by request or *ex officio*.<sup>14</sup> The Prosecutor General's office rarely, if ever, takes over a case; instead they may ask for it, review it, and send back to the respective office in the chain of command, with instructions on how to proceed.<sup>15</sup>

The office must also carry out regular "general reviews" and reviews in a specific field or of a specific topic<sup>16</sup> at the regional and county offices. That is, they periodically—usually every 4 years—scrutinize the files of all cases of a certain type within a defined period (usually 6 months) that were dealt with by the particular prosecutor's office, in order to assess the quality and quantity of the work and the quality of leadership.<sup>17</sup> This helps in evaluating the performance of individual prosecutors and selecting possible future leaders. The findings of such reviews are made in writing and are discussed at a meeting with the participation of the interested parties, such as the senior staff of the highest-ranking prosecution office, a representative of the Prosecutor General's office, if the review took place at a local office, the respective police headquarters, etc. Decisions on how to improve practice are discussed at a meeting with the prosecutors in the office reviewed. A further source of information is the Division of Data Processing and Information of the Prosecutor General's office, which keeps crime and other statistics, as well as the Institute on Criminology, a research institute attached to the Prosecution Service.<sup>18</sup>

12 See 25/2003 (ÜK.12) LÜ, General Instruction, Art. 4, 5, 27(2).

13 Act V of 1972 On Public Prosecution Service of the Hungarian Republic, Art. 2(2)(a)–(j).

14 25/2003 (ÜK.12) LÜ, General Instruction, Art. 62. This review power allows higher offices to review lower offices' files, give instructions, change or quash specific acts, and modify decisions.

15 During 40 years of prosecutorial service, the author encountered two such cases. As the deputy chief prosecutor of Budapest, he did not agree with the instructions, and therefore I offered the Prosecutor General's office the opportunity to take over the cases, which they did.

16 25/2003 (ÜK.12) LÜ, General Instruction, Art. 31.

17 The files contain drafts by the ordinary prosecutor in charge, with possible corrections and modifications added in handwriting of a different color by his superior. See 25/2003 (ÜK.12) LÜ, General Instruction, Art. 70(5).

18 Act V of 1972 On Public Prosecution Service of the Hungarian Republic, Art. 18(2) provides that "[t]he National Institute on Criminology is the scholarly and research organ of the Public Prosecution Service."



Chief Appellate Prosecutors' offices function at the level of regional appellate courts. However, they are organizationally separate and subordinated to the Prosecutor General's office. The Appellate Prosecutors' offices handle criminal and civil or administrative cases from the territory covered by the jurisdiction of the respective Appellate Court, appealed from county courts to the regional appellate courts.<sup>19</sup> These offices are divided into criminal and civil/administrative law sections.<sup>20</sup>

*County and Local Offices:* Chief Prosecutors' offices are found in each of the 19 counties and in Budapest. They operate at the level of the county courts, but are organizationally separate from the courts. These offices have full authority in all phases of criminal proceedings, as well as in other areas, such as review of legality (discussed below) in public administrative organs.<sup>21</sup>

Chief Prosecutors decide to bring criminal charges before the county courts as first instance courts, and represent the prosecution in trial and on appeal.<sup>22</sup> The Chief Prosecutors' offices also direct and supervise investigations conducted by county-level police units.

Chief Prosecutors' offices direct and supervise the activities of the local prosecution offices within their territorial jurisdiction.<sup>23</sup> In this capacity, they handle appeals ("complaints" [*panasz*], a sort of hierarchical remedy during investigations)<sup>24</sup> by interested parties, mainly victims or suspects, against decisions by lower-level prosecution offices, such as suspension of an investigation or dismissal of a case. In so doing, they are obliged to review and revise the lower-level prosecution office's work through individual cases and decisions. If the decision is not proper, the higher-ranking office is entitled to modify or nullify it.<sup>25</sup> In court proceedings, the prosecutor of the first instance may appeal any decision, including acquittal. Cases appealed from the local courts are sent to the second instance (county) court by way of the Chief Prosecutor's office, which must examine the records of the first instance proceedings and produce a complete motion (in writing or orally) addressed to the second instance court.<sup>26</sup> The Chief Prosecutor's office can review the actions of the local pros-

19 Three to five counties belong to each. See *supra* note 2. See also Act XIX of 1998: *A büntetőeljárásról* [On Criminal Procedure Code] [hereinafter Criminal Procedure Code, 1998], Art. 341(2).

20 25/2003 (ÜK.12) LÜ, General Instruction, Art. 37(2).

21 25/2003 (ÜK.12) LÜ, General Instruction, Art. 45(2).

22 The county courts operate as both instances. They are first instance courts in cases of more serious crimes, such as murder, intentional manslaughter, kidnapping, act of terrorism, crimes that carry life imprisonment, etc., specified in Art.16(1)(a)–(h) of the Criminal Procedure Code, 1998. They also operate as courts of appeals in relation to local courts. The criminal courts of general competence are the local (city and, in Budapest, district) courts; they are the first instance courts in cases of criminal offenses not included in Art.16(1)(a)–(h) of the Criminal Procedure Code, 1998. The Chief Prosecutors' offices proceed in both instances. They proceed at second (appeal) instance in cases that were handled at first instance by the local prosecution offices in the local courts. See Criminal Procedure Code, 1998, Art. 13(1), 13(2)(a), 15, 16, 28(7), 341(4). If they proceed in the county court as first instance court, they may appeal the court's decision and the case will be reviewed by a Regional Appellate Court, with participation of the respective Chief Appellate Prosecutor's office. See Criminal Procedure Code, 1998, Art. 13(2)(b), 341(4).

23 25/2003 (ÜK.12) LÜ, General Instruction, Art. 42(1).

24 Criminal Procedure Code, 1998, Art. 228.

25 Criminal Procedure Code, 1998, Art. 228(3).

26 Criminal Procedure Code, 1998, Art. 341(4).

ecution office and the prosecutor in charge of the case. The Chief Prosecutor may revoke the prosecution's appeal, or, while maintaining it, may comment separately in an internal document on the trial actions of the first prosecutorial instance.

A separate Prosecutorial Investigations Office (PIO) is also found in each county and in Budapest. It is no longer part of the Chief Prosecutor's office—as it was for many years—but a unit subordinate to it, like local prosecution offices. However, directors of local prosecution offices may proceed only in cases under the jurisdiction of the respective local court. In contrast, the head of the PIO may proceed in any case referred to the office if the offense occurred within the county, and may bring charges in any local court in the county, as well as in the county court.

In addition, the Chief Prosecutor's office, as a higher-ranking office, is entitled (and sometimes obliged) to change a decision in any case, either by request or *ex officio*, and undertakes periodic "general reviews" and "reviews of specific fields or topics," as discussed below.<sup>27</sup> Chief Prosecutors' offices also review the legality of public administrative acts<sup>28</sup> and have responsibilities relating to civil law and labor law.<sup>29</sup>

The head of the office is the chief prosecutor of the county, usually with one or two deputies.<sup>30</sup> Prosecutors in these offices often work in specialized organizational units within the criminal and civil-administrative law sections.<sup>31</sup> Within the criminal law section, specially trained prosecutors are usually assigned to juvenile and traffic crime cases; at some county-level offices, specialized units deal with economic crimes, organized crime and other complex cases.<sup>32</sup>

Local prosecution offices below the county level have authority over all criminal cases within the first-instance jurisdiction of the local courts in their territory.<sup>33</sup> They are generally not divided into organizational units; staff usually consists of three to eight prosecutors, including the head of the office and a deputy, who direct and supervise the other prosecutors. Individual prosecutors are normally assigned to either criminal or administrative law; other specializations—such as investigative work or trial advocacy—are usually informal, depending on the inclination of the prosecutor and the discretion of the office head.

27 See *supra* notes 16-17.. See also 25/2003 (ÜK.12) LÜ, General Instruction, Art. 49.

28 See Section 3.3 below.

29 See Section 3.3 below.

30 The Municipal Chief Prosecutor (Budapest) has four deputies—for criminal law, for civil and administrative law, for the Metropolitan Prosecutorial Investigations Office and for the Central Prosecutorial Investigations Office, which is attached to the Municipal Chief Prosecutor's office (the author was chief prosecutor in this office). County offices have deputies for criminal law and for civil and administrative law. See 25/2003 (ÜK.12) LÜ, General Instruction, Art. 43(1), 46. However, the Prosecutor General may prefer a different organizational scheme—one deputy for criminal law matters and a department head for the rest, for example, depending on staff and caseload.

31 25/2003 (ÜK.12) LÜ, General Instruction, Art. 45(2). It is up to the chief prosecutor to establish the organizational and operational regulations for his office. They should be in the form of a general instruction, which requires the Prosecutor General's approval.

32 Information provided by József Stauber, Head of Branch in the Prosecutor General's office, in his Letter No. Ig. 757/2004./1-I. Legf. Ü (December 21, 2004).

33 25/2003 (ÜK.12) LÜ, General Instruction, Art. 56.

*Central Organization between Offices:* The Prosecution Service is a hierarchical and centralized organization. The Service is subordinated to the Prosecutor General, who in turn is accountable—but not subordinate—to Parliament.

Prosecution offices at different levels are subordinated to one another in a hierarchy, but this reflects only the subordination of the heads of the offices involved. The Prosecutor General's office is at the top of the pyramid, superior to any other office. However, prosecutors in the Prosecutor General's office are not entitled to instruct prosecutors in lower-level offices because they are not their superiors. They may only advise the Prosecutor General—or another leader with delegated powers in the Prosecutor General's office—to instruct the Chief Prosecutor, and if necessary, through him, the head of the local prosecution office and the responsible prosecutor there, to take an action.<sup>34</sup>

The Prosecutor General is superior to all prosecutors, and may intervene in any individual case.<sup>35</sup> In addition, his office issued general instruction No 25/2003. (ÜK.12.)LÜ, frequently referred to here, which regulates the organization and operation of the Prosecutor General's office and establishes basic rules for the organization and operation of other offices, as well as the distribution of authority and responsibility among different ranks and leadership positions.<sup>36</sup> The county and regional (Appellate) Chief Prosecutors are entitled to issue similar regulations in regard to the offices subordinated to them, and all heads of local prosecution offices are entitled to establish work rules for their offices.<sup>37</sup>

The Prosecutor General personally exercises exclusive authority over the appointment, promotion, discipline, and dismissal of prosecutors,<sup>38</sup> except for his three deputies, whom he nominates and the President appoints.<sup>39</sup>

*Central Organization within Each Office:* Each office has a head responsible for all its operations. The head of office is generally expected to direct the overall activity of the office and to be aware of the more important problems, significant cases, and major decisions relating to his territorial jurisdiction. The head of each office is superior to all lower ranking prosecutors in the prosecution office in question; he may instruct any of them, take over any case at any time from any of them, and assign another prosecutor to any case at any time.<sup>40</sup> However, explicit instructions are seldom given. Even if they come from a higher-ranking prosecutor, references to facts, legal rules, and professional expectations are not considered “instructions.”

34 25/2003 (ÜK.12) LÜ, General Instruction, Art. 60, 62. See also Act V of 1972 On Public Prosecution Service of the Hungarian Republic, Art. 6(1).

35 25/2003 (ÜK.12) LÜ, General Instruction, Art. 61, 62.

36 See the specification of “leading” and “higher leading” positions in Act LXXX On Service Relationships, Art. 16.

37 25/2003 (ÜK.12) LÜ, General Instruction, Art. 53(2)(a). They require the approval of the chief prosecutor.

38 Act LXXX On Service Relationships, Art. 2. See also Sections 2.3 and 2.4 below.

39 Act LXXX On Service Relationships, Art. 14(3).

40 25/2003 (ÜK.12) LÜ, General Instruction, Art. 61, 62(1).

Where the Code of Criminal Procedure refers to the “public prosecutor,” it means the prosecution office operating within the jurisdiction; but it is the head of the office who decides what actions should be taken. That is, the power of the office is vested in the head of the office; the office, and the prosecutors in it, function as a unit acting under the office head’s authority and representing him.<sup>41</sup>

Consequently, documents must be signed by the head of office, or the head of the particular unit or individual prosecutor, as indicated by the internal regulations of the office in question.<sup>42</sup> Indictments and other documents issued in criminal cases on behalf of the Municipal Chief Prosecutor’s offices in Budapest must normally be signed by the Deputy Chief Prosecutor for criminal matters, and those of local prosecution offices by the local prosecutor (the head of the local office), but nearly all offices have experienced prosecutors authorized by the leader to sign their own, and in some cases other people’s, documents.<sup>43</sup>

In general, however, an individual prosecutor, while representing the Public Prosecution Service (the head of the respective office), is considered by law to be fully empowered, and his statements are regarded as if they were made by the head of the office; thus individual prosecutors may represent the Prosecution Service in court, and may act on its behalf. Any limitations set on a prosecutor’s authority by a superior’s instructions concerning his procedural actions are considered internal prosecution office matters and have no impact on the validity of actions taken or statements made.<sup>44</sup>

At the regional and county level, the head of office is the Chief Prosecutor; some of the chief prosecutors’ powers may be transferred to deputies or others (such as leaders of departments, groups, or even very experienced ordinary prosecutors), but certain powers must be exercised personally by the head of office.<sup>45</sup>

*Case Distribution:* Ordinary prosecutors are assigned to a county (municipal) prosecution office, or a department of the Prosecutor General’s office, by the Prosecutor General, and to a local prosecution office or to a unit of the Chief Prosecutor’s office by the Chief Prosecutor. They are assigned to individual cases by the head of their unit or the head of the (local) office. In principle all ordinary prosecutors are of equal rank, but in practice experience, specialization, and capacity result in a *de facto* sys-

41 Criminal Procedure Code, 1998, Art. 28(2) provides that “[t]he prosecutor may exercise the powers vested in the prosecution office in which he serves.”

42 25/2003 (ÜK.12) LÜ, General Instruction, Art. 70(1) The heads of offices (heads of departments, chief appellate and chief prosecutors, heads of local prosecution offices) may authorize subordinates to sign documents on behalf of the office. See *id.*, Art. 5(2)(d), 34(3)(e), 42(3)(e), 52(2)(a).

43 This has been the practice for several decades, in the author’s experience.

44 If the statements or actions of a prosecutor are in overt contravention of a limit placed on his authority by his superior, but otherwise are formally legal, they are considered valid. The prosecutor may bear disciplinary—or even criminal—responsibility for the action, but the risk of his disobedience is borne by the Prosecution Service. If, for example, a prosecutor is instructed by his superior to proceed with a case, but instead drops the charge at trial, the prosecutor may be disciplined, but the court must cease proceedings.

45 These responsibilities are specified in 25/2003 (ÜK.12) LÜ, General Instruction, Art. 42(3)(a)–(d), (f)–(j), (l), (n), and (p): to sign documents addressed to the Prosecutor General and MPs, general instructions, guidelines, and memoranda, and to decide on the tasks and (transferred) powers of prosecutors.

tem of seniority, in which junior (less experienced) prosecutors solicit the advice of senior colleagues.

Each office includes sections (specialized public prosecutors or units) to deal with particular kinds of cases, such as regular review of cases under investigation by the police or review of case files after investigation to decide on a charge.

Case files arriving at a prosecution office are assigned by the head of office (or in larger offices with specialized units, by the head of the unit) to an ordinary public prosecutor for scrutiny and consideration, at which time the superior may also give instructions concerning deadlines or reporting, or even concerning final dispensation. If he has given a definite instruction indicating a decision with which the prosecutor disagrees, he may report back explaining his reasons. If they are unable to agree, it is up to the superior to decide on the instruction. Only if the instruction is in writing must the prosecutor follow it, in which case responsibility rests with the superior.<sup>46</sup>

Notwithstanding, a prosecutor *must refuse* to follow an instruction if it amounts to a criminal offense and *may refuse* if its performance would endanger his life, health, or bodily integrity.<sup>47</sup> The prosecutor may request in writing to be relieved of carrying out instructions that he considers illegal or incompatible with his legal convictions. The request must include his reasons. Requests of this sort cannot be refused; the case must be given to another prosecutor or dealt with by the superior.<sup>48</sup> However, such cases seldom occur, as formal instructions are rare, and disagreement is even more unusual.<sup>49</sup>

*Employee Management:* Prosecutors' offices have several employee governing bodies. Each office has a Council of Prosecutorial Employees consisting of five members elected for a five-year period by the prosecutors and other employees in the office.<sup>50</sup> At least two of the members cannot be prosecutors. These Councils delegate one member each to the National Council of Prosecutorial Employees.<sup>51</sup>

The Councils of Prosecutorial Employees' agreement is needed for plans concerning use of funds or property earmarked for employee welfare—e.g. for maintenance of vacation resorts run by the Prosecutor General's office or employers' contributions to employees' sports activities. The Councils must be consulted on such matters, and if they do not agree, a formal labor law procedure is necessary. The Councils do not deal with professional matters involving the prosecution.

46 See Act LXXX On Service Relationships, Art. 453(2); 25/2003 (ÜK.12) LÜ, General Instruction, Art. 70(5).

47 Act LXXX On Service Relationships, Art. 43(3)(a).

48 Act LXXX On Service Relationships, Art. 43(5).

49 As the chief prosecutor of Budapest, the author knows of only one case in which a prosecutor asked to be relieved of a case he had been assigned. His request and reasons were accepted and another prosecutor was assigned, and there were no other consequences.

50 Employees in local prosecution offices vote in their respective County Prosecutor's office, Act LXXX On Service Relationships, Art. 3(1) and (2).

51 Act LXXX On Service Relationships, Art. 3(3) and (4).

A Council may also give an opinion on organizational or development plans, or plans to change the order of the work (e.g. the official hours) if many employees or significant employee interests are involved. The Council may also express its view if the Public Prosecution Service wishes to arrange contests, for example for employees or university students, and about work rules. In such cases, a Council's opposition is not decisive and does not necessarily lead to a formal labor law procedure.<sup>52</sup> The Council of Prosecutorial Employees may sue the Prosecution Service, however,<sup>53</sup> though this is unlikely to occur in practice.

Each office also holds a General Prosecutorial Meeting (GPM), a type of assembly attended by all the prosecutors in the office.<sup>54</sup> These meetings are convened by the Chief Prosecutor and may give advice, express opinions, and make proposals on problems of everyday practice.<sup>55</sup> They also elect members of the Prosecutorial Councils,<sup>56</sup> which consist of four to five prosecutors elected to five-year terms. Unlike the Councils of Prosecutorial Employees, they deal with professional prosecution matters, providing advice on appointments, promotions and dismissal of prosecutors (but not regarding the Prosecutor General and his deputies) and on other matters, if requested by the Prosecutor General or specified in a general instruction.<sup>57</sup>

Finally, in each office prosecutors assigned to the same section (criminal law, civil law, or administrative law) form professional "collegiums" that informally analyze and express views on theoretical and practical questions in the given area of law.<sup>58</sup>

## 2.2. Budgetary process

The Prosecution Service has an independent chapter in the state budget voted on by Parliament.<sup>59</sup>

The budget planning process begins with discussions between the head of the High Directorate on Management in the Prosecutor General's office and the Ministry of

52 Act LXXX On Service Relationships, Art. 4.

53 Act LXXX On Service Relationships, Art. 5(2).

54 Prosecutors in local prosecution offices take part in the General Prosecutorial Meeting of their respective County Prosecutor's office. In author's experience, GPMs are convened only if they are mandatory—that is, if the Prosecutor General requires one on some special matter, or if it is time to elect a Prosecutorial Council.

55 Act LXXX On Service Relationships, Art. 8(2).

56 Act LXXX On Service Relationships, Art. 10.

57 Act LXXX On Service Relationships, Art. 9(2). Prosecutorial Councils express opinions on appointments, promotions and other matters at the request of the Chief Prosecutors; it is up to the Chief Prosecutor to make recommendations to the Prosecutor General. See Section 2.4 below. At present there is no law or general instruction that would refer specific matters to GPMs.

58 Act LXXX On Service Relationships, Art.13(2). These collegiums have no decision making functions.

59 Act V of 1972 On Public Prosecution Service of the Hungarian Republic, Art. 5(2)(k). See also 25/2003 (ÜK.12) LÜ, General Instruction, Art. 3(4) and (5). Information on the budgetary process provided by József Stauber, Head of Branch in the Prosecutor General's Office, in his Letter No. Ig. 757/2004./1-I. Legf. Ü (December 21, 2004).



Finance to obtain information on key economic indicators to act as guidelines for the next year's state budget, after which Chief Prosecutors and Chief Appellate Prosecutors are asked to submit draft budgets to the High Directorate on Management of the Prosecutor General's office.

The High Directorate balances the draft budgets, develops options, consults with Chief and Chief Appellate Prosecutors and their finance experts, and then compiles a draft for the entire Prosecution Service. It is discussed by the leadership of the Prosecutor General's office<sup>60</sup> and submitted directly to Parliament (that is, not via the Ministry of Finance). It is considered an important element of prosecutorial independence to keep the budget independent in this way and free of direct government influence.

Parliament debates the bill, like any other. The government has nothing to do with the Prosecution Service budget proposal, but MPs from the governing coalition may criticize it in Parliamentary debate and offer comments and proposals.<sup>61</sup> These deliberations may be political as well as technical. However, in spite of the changes in the political composition of the Parliament and overt criticism of the Prosecutor General by the Parliamentary majority after 2002, allocations for the Public Prosecution Service rose steadily, if slowly, between 1996 and 2005.<sup>62</sup>

Budgetary allocations for the Public Prosecution Service appear in the budgetary account of the Service. Each Chief Appellate and Chief Prosecutor's office has its own account at the Hungarian National Bank, and allocations are transferred from the account of the Prosecutor General's office as agreed upon between the Chief Prosecutors and the High Director during the preparation of the Service's budget.<sup>63</sup> The budgetary allocations for the Prosecution Service as a whole are at the Prosecutor General's disposal and are recorded at the Prosecutor General's office. Allocations to lower level offices are decided upon in the process of budget preparation—and, if due to Parliamentary modifications it becomes necessary, afterwards—by the Prosecutor General.

Chief Appellate and Chief Prosecutors' offices have allocations at their disposal according to their "budgets," that is, their proposals approved by the Prosecutor General after talks with the High Director. They must keep accounts as required by law.<sup>64</sup>

60 See 25/2003 (ÜK.12) LÜ, General Instruction, Art. 72. This body consists of the Prosecutor General, his deputies, the Head of Branch on Matters of Personnel, Training, and Administration, and the personal secretary to the Prosecutor General.

61 The state budget is adopted like any other law and is discussed in Parliamentary committees and in plenary session. Thus all MPs—including those with political motivations—have the opportunity to express their views.

62 The totals of the entire state budget rose in this period from HUF 2,086,832 (1996) to 6,582,893.4 (2005) million, the totals for Chapter VIII (Public Prosecution Service) from 4,864.6 (1996) to 29,368.9 (2005) million, but because of inflation and the lack of a firm point of reference, these numbers tell us little. The share of the Public Prosecution Service was 0.2331 percent in 1996, and grew steadily to 0.4461 percent in 2005.

63 If Parliament modifies the proposal, the consequences of this modification in the amount of the allocation and its distribution should be analyzed by the High Director, and the necessary modifications in the particulars of the budget should be decided on by the Prosecutor General.

64 Act XXXVIII of 1992: *Az államháztartásról* [On Public Finance].



Heads of local prosecution offices have limited influence on the budgetary process. They may request cash for everyday expenses (stamps, cleaning supplies, etc.), but they have no bank accounts.

### 2.3. The status of the Prosecutor General

The Prosecutor General is nominated by the President and elected by Parliament.<sup>65</sup> Formally the nomination is at the President's discretion. Up to now there have been three such elections. At the first (in 1990) and the second (in 1996), there was general agreement among the Parliamentary groups on whom to elect. At the third election (in 2000) the governing coalition proposed a nominee who was elected by the votes of the majority. In theory, Parliament may reject the President's nominee, in which case the President must make a new nomination.<sup>66</sup>

There are no specific professional or personal qualifications for the position of Prosecutor General: any Hungarian citizen with no criminal record, the right to vote, and a university law degree who has passed a special law examination is eligible.<sup>67</sup> The Prosecutor General may not be a member of a political party or otherwise involved in political activity; he may not hold another political office.<sup>68</sup>

The Prosecutor General serves a six-year term,<sup>69</sup> with the possibility of re-election. His tenure terminates when he turns 70,<sup>70</sup> but he may resign at his discretion,<sup>71</sup> and may also be removed from office by Parliament at the recommendation of the President for inability to perform his official duties,<sup>72</sup> for commission of a crime<sup>73</sup> or other incompatibility with office (such as failure to meet the basic qualifications or failure

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65 Act XX of 1949: *A Magyar Köztársaság Alkotmánya* [On Constitution of the Hungarian Republic] (as amended), Art. 52(1).

66 As the President is also elected by Parliament, his political views often agree with those of the parliamentary majority; this may also hold true for other officers elected by the Parliament, such as the Chief Justice and the Prosecutor General. However, Parliament's tenure is four years, while the President's is five years, and the Chief Justice's and Prosecutor General's six years. As a result, these officers may serve under different parliamentary majorities than the ones that elected them. This has happened with both Presidents. The first Prosecutor General and the first Chief Justice had served three Parliaments (under the third, the Prosecutor General resigned). There were no real battles for the Prosecutor General's position, as a simple majority is needed for election. However, the term of Péter Polt as Prosecutor General expired on May 16, 2006. The President proposed an active Chief Appellate Prosecutor. The majority of the newly elected Parliament rejected the nominee, holding that he was a creature of Mr. Polt, whom they consider a "party soldier." György Bugyinszki, *Szocialista érvek a "nem" mögött*, *Népszabadság*, July 4, 2006, at 2. At the time of this writing, July 2006, the President was to nominate a new candidate for the post.

67 Act LXXX On Service Relationships, Art. 14(1).

68 Act XX of 1949 On Constitution of the Hungarian Republic, Art 53(2). See also Act LXXX On Service Relationships, Art. 38–40.

69 Act LXXX On Service Relationships, Art. 14(2).

70 Act LXXX On Service Relationships, Art. 20(1)(h).

71 Act LXXX On Service Relationships, Art. 20(1)(c) and (5).

72 Act LXXX On Service Relationships, Art. 20(1)(b) and (3).

73 Act LXXX On Service Relationships, Art. 20(8). In addition, the Prosecutor General automatically loses his official standing if he is convicted and sentenced by a court. See *id.*, Art. 20(1)(g).

to perform official duties), or if he is deemed unworthy of office by Parliament at the recommendation of the President.<sup>74</sup>

The Prosecutor General is accountable to Parliament; he submits an annual report to Parliament on the overall performance of the Prosecution Service and answers questions and interpellations concerning the work of the Service.<sup>75</sup> However, Parliament has no control over the Prosecutor General's administration of the Service or his instructions concerning and interventions in the conduct of individual investigations and trials. By contrast, the Prosecution Service itself is a hierarchical organization, in which the Prosecutor General has a decisive role.

*Deputy Prosecutors General:* The three deputies to the Prosecutor General are nominated and appointed to permanent positions by the President.<sup>76</sup> Dismissal rules for the deputies are the same as those for the Prosecutor General.<sup>77</sup>

## 2.4. The status of individual prosecutors

*Appointment to "Assistant Public Prosecutor" (ügyészségi fogalmazó).* Any Hungarian citizen with no criminal record and a university law degree may be appointed assistant public prosecutor. The number of such jobs varies from year to year depending on the foreseeable needs of the Prosecution Service.<sup>78</sup>

The Branch on Matters of Personnel, Training and Management in the Prosecutor General's office assesses the needs and invites people with law degrees to apply, indicating where and how many possible jobs are available. Applicants are usually interviewed by the Chief Prosecutors, who then recommend appointments to the Prosecutor General on the basis of impressions obtained at this meeting and documentation of university performance. The Prosecutor General may appoint an applicant at his discretion, but in practice he usually relies on the Chief Prosecutors' recommendations.

The appointee is an "assistant public prosecutor" for at least three years. Each Chief Prosecutor's office must have a unit (or at least a public prosecutor specially assigned to this task) in charge of Matters of Personnel and Training, under the direct supervision of the Chief Prosecutor.<sup>79</sup> Assistant public prosecutors are usually assigned to a local prosecution office by the Chief Prosecutor. The Public Prosecution

74 Act LXXX On Service Relationships, Art. 20(1)(f), 20(8), 20(1)(d), 39(2).

75 Act XX of 1949 On Constitution of the Hungarian Republic, Art.52(2). See *infra* notes 220, 222.

76 Act LXXX On Service Relationships, Art. 14(3).

77 Act LXXX On Service Relationships, Art. 21. The Prosecutor General is entitled to make proposals; the decision rests with the President of the Republic.

78 Similar positions in the Judiciary and Advocacy are called "draftsmen at court" and "candidate advocate." These, too, are filled by young lawyers who have just earned their degrees and are gaining experience by working at court or in an advocate's office. In no branch of the legal profession may anyone serve as a "full-fledged" professional with only a law degree but without a satisfactory period (usually 3 years) of practical experience.

79 25/2003 (ÜK.12) LÜ, General Instruction, Art. 45(2)(3).

Service has a standard 3-year program for the basic training of assistant public prosecutors; it includes periods spent in the main fields of prosecutorial work, at the first as well as the second instance, in both the penal law and the administrative and civil law sections. During this training period, they must serve in the local office to which they are assigned, but they are temporarily transferred to the Chief Prosecutor's office in order to become familiar with types of cases that cannot be found at the local level. They must also serve a period at the Prosecutorial Investigations Office (see Section 4.4 below).

The trainees work under the supervision of an experienced public prosecutor ("instructor") who advises and helps them. They are assigned to real cases, they may interrogate real suspects or witnesses (under the supervision of the instructor), and they must produce drafts of prosecutorial documents, but they may not represent the Prosecution Service. All their work must be directly supervised and approved by the instructor.<sup>80</sup>

The instructors are selected from prosecutors in the unit where the trainee is currently serving and are expected to provide an evaluation of the trainee's performance. In addition, when the trainee completes his or her training in one field of law, he or she is examined by specialists in that area of law and by the Deputy Chief Prosecutor responsible for the section.

After completing 34 of the obligatory 36 months of practice, the assistant public prosecutor<sup>81</sup> may apply to take an examination given by the Secretariat of the Committee on Special Legal Examination<sup>82</sup> at the Ministry of Justice that qualifies them to be appointed prosecutorial law secretaries (*titkár*). At least one year of service as such a secretary is a prerequisite for initial appointment as a public prosecutor.<sup>83</sup> To some extent, secretaries may act more independently than assistant public prosecutors—e.g., they may represent the local Prosecution Office at local court trials<sup>84</sup> and sign some official letters (though not those concerning the merits of a case).

*Initial public prosecutorial appointments* are for a definite three year period, except for those who have previously served in certain specified legal positions.<sup>85</sup>

80 25/2003 (ÜK.12) LÜ, General Instruction, Art. 58(2).

81 The same procedure applies to draftsmen at court and candidate advocates. See *supra* note 78.

82 The Committee is composed of well-known judges, public prosecutors, advocates and other representatives of the legal profession. The examination is partly in writing, partly oral and consists of three parts. When one part is done, the young lawyer may apply to take the next one. The entire examination takes about 6 months to complete. See 5/1991 (IV.4) IM, Ordinance of the Minister of Justice: *A jogi szakvizsgáról* [On Special Legal Examination].

83 Act LXXX On Service Relationships, Art. 14(5). This requirement does not apply to those who have already served three years as judges or public prosecutors or have earned a PhD. See *id.*, Art. 14(4)(a)(c).

84 Criminal Procedure Code, 1998, Art. 241(2).

85 As public prosecutors, judges of the Constitutional Court, judges of a court of law, military judges, public notaries, advocates, or public servants of definite status in the central public administration. Act LXXX On Service Relationships, Art. 14(1) and (2).

Appointments are—as a rule—by competition.<sup>86</sup> Applicants must be Hungarian citizens, possess no criminal record, have the vote, have a university law degree, submit a property declaration and have passed health and psychological examinations.

The jobs are publicly announced by the Branch on Matters of Personnel, Training and Management in the Prosecutor General's office, indicating which Chief Prosecutor's office and how many vacancies are available. Applicants are normally interviewed by the Chief Prosecutor and the prosecutor in charge of personnel. On the basis of available notes from the training period and on personal impressions, the Chief Prosecutor recommends one for appointment. The Prosecutorial Council of the Chief Prosecutor's office gives its opinion on the Chief Prosecutor's proposal, and both documents are submitted to the Prosecutor General, who decides whether to appoint the applicant for a three year period.<sup>87</sup> In the not-uncommon case that the number of applicants exceeds the number of jobs, one—or some—of the applicants will be appointed. First appointees are generally assigned the rank of “prosecutor in a local prosecution office” by the Prosecutor General and are assigned by the respective Chief Prosecutor to the local prosecution office, where they have the full powers of ordinary prosecutors.

If the prosecutor wishes the appointment to become permanent following the initial three year term, his or her performance and qualifications are evaluated by the Chief Prosecutor, with the help of the prosecutor's direct superiors (the head of the local prosecution office or the unit where actually serves).<sup>88</sup> The summary of the evaluation must be supported by factual findings. If the evaluation is satisfactory, the Prosecutor General will appoint the candidate to a permanent position without competition.<sup>89</sup>

A prosecutor's professional performance should thereafter be evaluated twice every six years in a similar way.<sup>90</sup> However, once two years have passed since an evaluation, a prosecutor may request a new evaluation at any time, if he believes his performance in the last two years may result in a more favorable assessment.<sup>91</sup> An evaluation may also be conducted on the superior's initiative at any time if there is reason to believe the prosecutor has become “unsuitable” or if otherwise warranted by changes in the prosecutor's conduct or performance.<sup>92</sup> The prosecutor may request the professional collegium's<sup>93</sup> written view of the evaluation. While he or she is entitled to request judicial remedy in case of erroneous factual findings or insulting statements in the evaluation,<sup>94</sup> such requests are seldom found in practice.

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86 Act LXXX On Service Relationships, Art. 14/C(1).

87 Act LXXX On Service Relationships, Art. 14(4).

88 Act LXXX On Service Relationships, Art. 14/D(1). This is the first evaluation of the prosecutor's professional performance. *See id.*, Art. 41(1). In practice, the draft of the evaluation is written by the direct superior of the prosecutor in question and is handed to the prosecutor in charge of personnel; the latter requests further data from the senior prosecutor's (Chief Prosecutor's) office, which regularly reviews cases from the respective local office (this information is based on personal experience).

89 Act LXXX On Service Relationships, Art. 14/D(3).

90 Act LXXX On Service Relationships, Art. 41(1).

91 Act LXXX On Service Relationships, Art. 41(2)(a).

92 Act LXXX On Service Relationships, Art. 41(2)(b).

93 *See supra* note 58.

94 Act LXXX On Service Relationships, Art. 42(1) and (5).

*Promotion:* Normally the next step for an ordinary local prosecutor is the job of deputy head of a local prosecution office or that of an ordinary prosecutor at the County Chief Prosecutor's office. Promotions to "higher leading" and "leading" positions<sup>95</sup> in the Prosecution Service take place through competition, but the Prosecutor General may order any other prosecutor's position filled by competition as well.<sup>96</sup>

Vacancies in a Chief Prosecutor's office (which would be a promotion in rank for an ordinary public prosecutor at a local prosecution office) may be filled, at the Prosecutor General's discretion,<sup>97</sup> by competition publicized in the official gazette of the Prosecution Service. Possible applicants are not limited to public prosecutors; the competition is open to other members of the legal profession—judges, advocates, etc.<sup>98</sup> The head of the office (the Chief Prosecutor or the head of a branch of the Prosecutor General's office) with the vacancy reviews all applications (which may include previous evaluations for internal applicants), usually interviews all the applicants, and proposes a candidate to the Prosecutor General. The Prosecutorial Council for the office with the vacancy also reviews the proposal and submits its opinion to the Prosecutor General, but the final decision is his alone.<sup>99</sup>

While this is a competitive process with public requirements and is open to anyone meeting those requirements, in practice outsiders seldom apply.

The Prosecutor General may, in case of long-term excellent performance, exceptionally promote a public prosecutor to a higher salary grade. This may happen to the same person twice during his or her prosecutorial career, by one grade each time. The Prosecutor General may also award prosecutors special titles for excellent performance for at least 6 years. These titles express respect and acknowledgement of professional excellence, but do not bestow additional authority. They are accompanied by a monthly financial bonus.<sup>100</sup>

The promotion path for prosecutors resembles a civil service path, in that many prosecutors tend to advance to higher offices as ordinary public prosecutors rather than taking on supervisory roles.

*Tenure:* As noted, prosecutors are initially appointed for three years, and only after review receive a permanent appointment until age 70.<sup>101</sup> They may only be removed for cause.

95 See their list in the Act LXXX On Service Relationships, Art. 16(2)(a)–(k) and (3)(a)–(j).

96 Act LXXX On Service Relationships, Art. 16(4). These are promotions in rank (promotion to a higher position) and in file (promotion of someone in the same position to a higher salary level). Higher remuneration for the same position is available automatically due to longer time of service, and with it higher salary grades. See *id.*, Art. 46/F(1).

97 Act LXXX On Service Relationships, Art. 16(4).

98 Act LXXX On Service Relationships, Art. 42(4).

99 Act LXXX On Service Relationships, Art. 9(2) and (3).

100 Act LXXX On Service Relationships, Art. 46/F, 46/H(2) and (3). For prosecutorial investigators and clerks, the title of "Ügyészégi főtanácsos" (chief prosecutorial adviser) or "Ügyészégi tanácsos" (prosecutorial adviser) may be granted for similar reasons: excellence of work for at least six years. See *id.*, Art. 81/I.

101 Act LXXX On Service Relationships, Art. 26(k).

The Prosecutor General may dismiss a prosecutor for cause for a variety of reasons: failure or inability adequately to perform his duties, including for medical reasons;<sup>102</sup> failure to fulfill the basic requirements of service (such as clean criminal record or not holding political office);<sup>103</sup> or failure to provide or maintain a truthful property declaration.<sup>104</sup> In addition, the Prosecutor General may let a prosecutor go due to reorganization of the Service or reduction in staffing levels.<sup>105</sup> Appointments to leadership positions<sup>106</sup> may be withdrawn by the Prosecutor General at any time at his discretion.<sup>107</sup> However, in practice dismissal seldom occurs, except for disciplinary or medical reasons.<sup>108</sup>

*Restriction on Activities:* Prosecutors are obliged to refrain from activities incompatible with their professional responsibilities.<sup>109</sup> Public prosecutors must not engage in remunerative activity outside of their work; they are prohibited from being members of executive or supervisory boards or taking other leading positions in public companies, or even having obligations to contribute personal activity to such companies. They may not accept honorariums for public activity connected to their official standing, and they are prohibited from membership in political parties or active engagement in politics, as well as any office or activity incompatible with their profession. Prosecutors may be subject to disciplinary measures for violating these prohibitions,<sup>110</sup> though it is very rare in practice.

However, prosecutors are allowed to engage in scholarship, educational activities (including coaching or refereeing sports), lecturing, writing, editing, and work in

102 Act LXXX On Service Relationships, Art. 28.

103 See discussion of appointments immediately above.

104 Act LXXX On Service Relationships, Art. 26(m).

105 Act LXXX On Service Relationships, Art. 28(1)(a) and (b).

106 These are specified in Act LXXX On Service Relationships, Art. 16(2) and (3) and include—besides the Prosecutor General and his deputies—heads of branches and departments of the Prosecutor General's office, their deputies, all the Chief Prosecutors and their deputies, the heads of local prosecution offices and their deputies, and the heads of organizational units (departments, groups) at any level prosecution office.

107 Act LXXX On Service Relationships, Art. 22(1).

108 This is based on the author's many years of personal experience as Municipal Chief Prosecutor. Prosecutors prefer to resign than to be dismissed. Act LXXX On Service Relationships, Art. 26(c) and (d), distinguishes between "resignation" and "extraordinary resignation." In case of (normal) resignation (which is a statement addressed to the Prosecutor General), no explanation is needed; the service relationship ceases three (for leaders of higher position six) months later, but the prosecutor may be relieved by the Prosecutor General from official duties. Extraordinary resignation requires an explanation. It may take place only if the *employer* (the Prosecution Service) to a significant extent, intentionally or out of gross negligence, violated any of its important duties originating from the service relationship, or made it impossible for the prosecutor to maintain his service relationship. In such a case, the prosecutor—who must make a statement within 6 days from the day he became aware of the reason—must be relieved of official duties at once and is entitled to a salary for the three or six months mentioned above.

109 These are specified in Act LXXX On Service Relationships, Art. 35, 36(1) and (2).

110 Act LXXX On Service Relationships, Art. 35–37, 39. Failure to report a possible incompatibility is a disciplinary offense. See *id.*, Art. 53(1)(a). However, the authors has never heard of any such cases in practice.



the arts.<sup>111</sup> Prosecutors are required to make a declaration concerning their property holdings every three years.<sup>112</sup>

## 2.5. Individual accountability of prosecutors

*Evaluation:* The Prosecution Service measures its performance mainly by statistical data, including measures of the number of cases; the number and sorts of prosecutorial measures taken; and the effectiveness of prosecutorial motions as reflected by judicial decisions (especially, though not exclusively, conviction rates and rates of preliminary confinement moved for and ordered).<sup>113</sup> All investigations must be completed and charges filed, if at all, within specified time frames.<sup>114</sup> Measurement of backlogs is considered an important component in the assessment of an office's performance, and that of its head.

Performance of individual prosecutors is assessed by their superiors, primarily by the quality and quantity of their work. Quality is defined by the complexity of the factual and legal problems involved in the cases handled and their proper resolution by the prosecutor. In addition, the prosecutor's reliability, professional dedication, general behavior (accuracy, precision, and inventiveness), ability to recognize problems, appearance, ability to cooperate with officials of partner organizations, and communication with clients, colleagues, and subordinates are also taken into consideration.<sup>115</sup>

*Disciplinary Procedures:* Prosecutors are subject to internal disciplinary procedures.<sup>116</sup> The Prosecutor General has exclusive disciplinary authority over prosecutors of "higher leading" position<sup>117</sup> and general disciplinary authority over all prosecutors, but certain powers are transferred to heads of branches and independent departments in his office, or to heads of subsidiary prosecution offices in regard to those working under them.<sup>118</sup> Prosecutors may be subject to discipline for intentionally or negligently violating their official duties or for behavior—even private behavior—that harms the reputation of the prosecutorial profession.<sup>119</sup>

The authorized superior of a prosecutor may commence disciplinary proceedings against a prosecutor, or issue an oral or written warning for minor offenses. The pros-

111 Act LXXX On Service Relationships, Art. 36(1).

112 Act LXXX On Service Relationships, Art. 94/B(1)(a).

113 See Appendices.

114 Criminal Procedure Code, 1998, Art. 176, 216(1) and (2).

115 For descriptions of the evaluation process, see Section 2.4 above.

116 Act LXXX On Service Relationships, Art. 52–69.

117 Act LXXX On Service Relationships, Art. 16(2)(a)–(k).

118 Act LXXX On Service Relationships, Art. 56.

119 Act LXXX On Service Relationships, Art. 53(1)(a)–(c). Some examples from the author's experience: a prosecutor was responsible for disruptive behavior in his private (family) life, coming home drunk several times, loudly quarreling with and threatening his family, and making it necessary for neighbors to call the police. One of the author's subordinates dropped the charge in a criminal case, instead of reporting his disagreement and asking to be relieved of carrying out explicit instructions to the contrary. Another prosecutor failed to complete his work in the time required, creating a backlog in casework.



ecutor may challenge the facts, require an oral warning to be put in writing, and appeal to the Prosecutor General.<sup>120</sup> For serious offenses, the superior, or a commissioner in charge of disciplinary examination appointed by him, conducts an investigation.<sup>121</sup> Proceedings must be completed and the disciplinary case must be decided at first instance within 30 days, with the possibility of a 30-day extension. However a disciplinary case lasting more than a month is rare. Sanctions may include warning, reprimand,<sup>122</sup> loss of titles, reduction in salary, removal from a senior position or transfer to a lower assignment, or dismissal.<sup>123</sup>

The Prosecutor General may impose any of these sanctions. Other authorized superiors may only impose warnings and reprimands; if they believe the prosecutor is guilty and a more severe disciplinary sanction is necessary, they must submit a recommendation to the Prosecutor General. Prosecutors may appeal disciplinary findings by authorized superiors to the Prosecutor General and may appeal his decision in court. In practice, disciplinary cases rarely occur.<sup>124</sup>

*Code of Ethics:* The Prosecution Service has no code of ethics; behavior is regulated by legal rules and the general instructions of the Prosecutor General and other heads of offices. There are also traditional, customary rules regulating behavior of prosecutors.

The National Association of Prosecutors—a member organization of the International Association of Prosecutors—has issued a Code of Conduct for public prosecutors, as has the International Association itself. These codes are sanctioned by the organizations themselves and not the Service. However, in practice the rules of either code of conduct usually parallel some legal, moral, or customary prohibition, so their violation can result in disciplinary measures.<sup>125</sup>

*Civil and Criminal Liability:* Prosecutors may not be arrested without an express lifting of their immunity.<sup>126</sup> The Prosecutor General's immunity may only be lifted by

120 Act LXXX On Service Relationships, Art. 54(3)–(4).

121 Act LXXX On Service Relationships, Art. 59.

122 “*Megróvás*” (reprimand) is a more severe disciplinary punishment than “*feddés*” (warning), though both must be in written form.

123 Act LXXX On Service Relationships, Art. 55(1)(a)–(f) and (2).

124 Act LXXX On Service Relationships, Art. 64(3). During 22 years as a senior prosecutor at the Municipal Chief Prosecutor's office (the largest in the country), the author encountered some six or seven disciplinary cases in total. In the 1960s and 1970s, the Prosecutor General's office each year made information public within the Service on all disciplinary cases (5–8 in the whole country) for the current year. However, it should be noted that if a prosecutor commits a more serious disciplinary offense, he or she can escape punishment and even dismissal by resorting to “extraordinary resignation” (see *supra* note 108), terminating both the service relationship and the Prosecutor General's disciplinary authority over him.

125 These include, for example, the prohibition on discrimination, which is not explicitly formulated as a disciplinary offense in the Prosecution Service but is explicitly included in the professional associations' codes of conduct (as well as in the Constitution). Prohibitions on the use of illegally obtained evidence are another example. Such breaches can be sanctioned by the associations themselves and, if they are breaches of official duty, may also be subject to criminal sanction.

126 Act V of 1972 On Public Prosecution Service of the Hungarian Republic, Art. 23. Lifting immunity is not a simple procedure, and in case of a minor infraction (“contravention”)—e.g. speeding or a similar traffic violation—the prosecutor may waive it instead of requiring an official procedure involving, for example, police county headquarters, National Headquarters, and Prosecutor General's

Parliament. For other employees of the Prosecution Service, the Chief Prosecution office of Prosecutorial Investigations must advise the Prosecutor General to lift immunity, entirely at his discretion.<sup>127</sup> Immunity protects the prosecutor while he is in the Prosecution Service; it relates to official status, not to official actions only. Therefore there is no need for specific regulations regarding the prosecutors' possible statements in court.

Prosecutors have no direct civil liability for their official actions; instead, the Prosecution Service is the responsible party.<sup>128</sup> However, if a prosecutor violates his official duties and causes harm to a third person, the Public Prosecution Service takes responsibility in regard to the damaged party, but may in turn seek damages from the prosecutor.<sup>129</sup> The prosecutor's liability to the Prosecution Service for intentional damages is unlimited, while damages for negligence are specified by law.<sup>130</sup> In practice, to the author's knowledge, no prosecutor has ever been required to indemnify the Public Prosecution Service under these rules.

If the Prosecution Service harms a prosecutor in connection with his service, it is responsible regardless of intention or negligence.<sup>131</sup> Prosecutors are entitled to take legal action to enforce claims connected to their service, as well as to challenge practically any action or omission of the Service that affects their service.<sup>132</sup>

## 2.6. Training

*Preparatory Education:* All prosecutors must hold a university law degree.<sup>133</sup> Increasingly, applicants with university honors (*summa cum laude* or *cum laude*) are selected.<sup>134</sup>

The standard training of assistant prosecutors is a three-year program. Assistant prosecutors serve several months in all sectors of local prosecution offices and in County Chief Prosecutor's offices. Assistants work under the direct supervision of experienced public prosecutors, called instructors, who supervise the assistants' casework, check draft documents, and evaluate their performance.<sup>135</sup>

*Continuing Training:* After the initial training period, there are no regular mandatory training courses in the Prosecution Service. There may be refresher courses for pros-

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office. Such waivers are not recorded, so no data exists on their frequency.

127 The Chief Prosecution office of Prosecutorial Investigations has jurisdiction over any criminal case where an employee of the Public Prosecution Service is suspected of having committed an offense. See *infra* note 239.

128 Act IV of 1959: *A Magyar Köztársaság polgári törvénykönyve* [On Civil Code], Art. 348, 349.

129 Act LXXX On Service Relationships, Art. 70(1) and (2).

130 Act LXXX On Service Relationships, Art. 71(2).

131 Act XXII of 1992: *A munka törvénykönyve* [On Code of Labor Relations], Art. 174.

132 Act LXXX On Service Relationships, Art. 76.

133 Act LXXX On Service Relationships, Art. 79(1).

134 This observation is based on personal experience as Municipal Chief Prosecutor.

135 See Section 2.4 above.

ecutors serving in units or fields dealing with special sorts of cases, such as juvenile or traffic cases, or for otherwise defined groups of prosecutors, e.g. those with under five years' experience. Participation by those in the indicated group is mandatory. There are also occasional mandatory courses on new developments in the law.

Prosecutors can take post-graduate courses and earn a second diploma, for which the Prosecution Service will bear some or all of the costs if the course relates to their professional responsibilities.<sup>136</sup> The additional education and degree can be taken into consideration for evaluation and promotion.

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### III. Functions and Powers of Prosecutors

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#### 3.1. Prosecutorial functions in criminal justice

The Prosecution Service has responsibilities at all stages of the criminal justice process. Prosecutors are responsible for investigation, whether conducted directly or by the investigative authorities they supervise; they decide on charges; in court, they represent the Public Prosecution Service and exercise claims and rights of appeal; and they supervise the legality and execution of punishments.<sup>137</sup>

*Discretion to Initiate Prosecution:* The criminal justice system is governed by the principle of legality; prosecutors are obliged to initiate investigation of all crimes of which they are informed, and if, after investigation, they are satisfied that a criminal offense has been committed, they are required—with limited exceptions—to prosecute these crimes in court.<sup>138</sup> Prosecutors may decline to prosecute on grounds of lack of sufficient evidence (if there is no prospect of conviction) or on grounds of legal obstacles (if the act does not amount to a crime, or if there are circumstances that exclude criminal responsibility).<sup>139</sup> Charges may also be postponed for one or two years.<sup>140</sup> However, since this requires more administrative work than actually bringing the charge, it is done relatively infrequently.

Prosecutors have a near monopoly on bringing cases to court. They have the exclusive right to bring charges for serious crimes, and also for all lesser crimes, save certain specified misdemeanors, which may be prosecuted only if the victim explicitly so desires and where the victim's expressed wish is legally considered a charge.

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136 This observation is based on the author's personal experience. The decision is made on a case-by-case basis in the Prosecutor General's office, Branch on Matters of Personnel, Training, and Management.

137 Act V of 1972 On Public Prosecution Service of the Hungarian Republic, Art. 3(2)(a)–(e).

138 Criminal Procedure Code, 1998, Art. 6(1).

139 Criminal Procedure Code, 1998, Art. 190(1)(a)–(j).

140 Criminal Procedure Code, 1998, Art. 222. See in this Section below.

In this limited framework of private prosecution, citizens are entitled to bring charges against adults (but not juveniles or soldiers) for minor bodily harm; breaches of secrecy of letters or other communications; defamation; slander; and verbal or physical insult.<sup>141</sup> The victim may initiate criminal proceedings in such cases by submitting to the court, directly or through the police and/or the prosecution office, a request to punish the offender. If the offender is unidentified, the court orders a police investigation. If the defendant has been identified, the court first attempts reconciliation; if that does not succeed, the normal procedure continues, with the victim acting as a private prosecutor.

If the victim requests the proceeding from the prosecution service, or from the police, who passed the request to the prosecutor, and in the prosecutor's opinion there is no public interest in prosecution, he may pass the victim's request to the court, to proceed with private prosecution.<sup>142</sup> However, the Prosecution Service may also bring charges in such cases, if there is a public interest in prosecuting the offense and the victim has asked for initiation of criminal action. The prosecutor may also take over the prosecution if the victim has already lodged it in court.

Victims of criminal offenses may also challenge any decision of the prosecutor, thus initiating a mandatory review within the prosecutorial hierarchy.<sup>143</sup> If the prosecutor refuses to commence an investigation or discontinues it, or drops charges once in court, a victim may appeal the decision, and if the internal review upholds the prosecutor's decision, which is the usual outcome, the victim may take over the prosecution (subsidiary private prosecution).<sup>144</sup> This is intended to be a final check on the Prosecution Service to ensure that it does not improperly fail to pursue charges.<sup>145</sup>

In practice, the overwhelming majority of criminal offenses are reported to the police and investigations<sup>146</sup> are initiated and completed by them, except in cases where the Prosecutorial Investigations Office has exclusive authority. However, the respective Prosecution Office must be informed of the commencement of an investigation, and the prosecutor may look at the files at any time, though this seldom occurs. If the case is more complicated and the investigation takes more than two months, the prosecutor's permission must be obtained. The head of the prosecution office, when informed of the initiation of an investigation, assigns a prosecutor to oversee the proceedings in the case; this prosecutor in charge of the case will from time to time

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141 Criminal Procedure Code, 1998, Art. 52(1).

142 Criminal Procedure Code, 1998, Art. 496.

143 Criminal Procedure Code, 1998, Art. 228.

144 Criminal Procedure Code, 1998, Art. 53.

145 This institution existed in Hungarian criminal procedure law between 1900 and 1954 and was re-established only by the Criminal Procedure Code of 1998, effective July 1, 2003. This restoration of private prosecution is in line with the Recommendation of the Committee of Ministers of the Council of Europe No. R(2000)19 of October 6, 2000 on the Role of the Public Prosecution in the Criminal Justice System, Item 33. While experience is limited so far, subsidiary private prosecutions seldom occur.

146 "Investigation" refers to an "examination" carried out originally by judicial authorities ("examining magistrate" or "*juge d'instruction*") in continental systems, but the power to summon and hear witnesses and suspects is also given to the police and other investigative authorities, which—as a rule—compile case files and pass them to the prosecution office.

request the files or demand oral information on developments. If the case seems extremely complicated or the offense is a very serious one, the prosecution office will intensify its oversight, and the prosecutor in charge will be present at important investigative actions, will take part in interrogations, etc. The prosecution may even take over the investigation; the head of the office in question makes this decision, with the advice of the prosecutor in charge of the case.

However, an investigation is seldom, if ever, taken over. Local and county prosecution offices are not really prepared to conduct investigations. Thus investigations may be (and in practice frequently are) conducted for two months by the police without the actual involvement of the prosecutor.

Once the investigation is completed, the police (or other investigative authority) passes the files to the respective prosecution office, where a prosecutor—not necessarily the same one who oversaw it while the investigation took place—will be assigned to it.

The Prosecution Service may dismiss the case for specified reasons<sup>147</sup> or may postpone bringing charges. If the offense is not serious, carries a maximum penalty of no more than 3 years imprisonment, there are extraordinary mitigating circumstances, and there is reason to believe that postponement will have an advantageous impact on the behavior of the offender, a postponement may take place. The prosecutor may impose conditions on the defendant, observance of which is monitored by the Probation Service.<sup>148</sup> If the probation period set by the prosecutor elapses and the conditions have been met without recidivism, the prosecutor will dismiss the case. If the defendant violates the conditions or commits another offense, the prosecutor will immediately bring charges.

Under the current provisions of the Hungarian Penal Code, an offense is an illegal act that is dangerous to society. If an otherwise prohibited act is not dangerous to society or has ceased or abated since the time of its commission, it may not be considered a criminal offense.<sup>149</sup> Cases of these kinds will be dismissed by the Public Prosecution Service with a warning to the offenders.<sup>150</sup> Such a decision,<sup>151</sup> like all prosecutorial decisions, must be explained in detail in writing and provided to the interested parties, who may appeal it and, if the decision is upheld, may initiate a private prosecution.

In practice, prosecutorial screening focuses on the prospect of conviction, based on

147 If there is a legal or practical obstacle to continuing the proceedings. Criminal Procedure Code, 1998, Art. 190(1)(a)–(i).

148 Conditions may include indemnification of the victim, community service, psychological or medical treatment, etc. See Criminal Procedure Code, 1998, Art. 225.

149 Act IV of 1978: *A Magyar Köztársaság büntető törvénykönyve* [On Penal Code], Art. 28, 36.

150 Act IV of 1978 On Penal Code, Art. 71; Code of Criminal Procedure, 1998, Art. 190(1)(a), (d), and (f). Though this is an apparent exception to the legality principle, from the point of view of substantive criminal law as understood in Hungary, it is not actually an exception, since the insignificance of the act means it is not an offense to begin with.

151 According to data from *Egységes Rendőrségi és Ügyészégi Bűnügyi Statisztika* [Uniform Police and Prosecutorial Statistics on Crime] (ERÜBS), the number of such dismissed cases on the national level in 2002 and 2003 was 9,594 and 10,423 respectively (ERÜBS is a database maintained by the Prosecutor General's office).

measured conviction rates.<sup>152</sup> While there is a theoretical risk that prosecutors will bring unfounded charges, the more practical danger may be that they refrain from bringing charges, for fear of acquittal.<sup>153</sup> During reviews of case files, higher-level offices may examine dismissed cases to determine whether vigorous prosecution could have achieved conviction.<sup>154</sup>

*Control of the Investigative Pre-Trial Phase:* Hungarian criminal procedure follows the inquisitorial system. In the overwhelming majority of cases, the prosecutor, instead of investigating, has the police investigate; the prosecutor takes part only in investigations of extraordinary importance. However, the law vests responsibility in the prosecution office.<sup>155</sup>

Some compulsory measures are in the power of the “investigative judge”—a judge or judges of the respective local court assigned by the president of the county court to perform judicial review of actions specified by law<sup>156</sup> prior to committal to the court. The investigative judge acts as “single judge” (*egyesbíró*),<sup>157</sup> as opposed to the “court” (*bíróság, bírói tanács*), which is a three-man council.<sup>158</sup> The link between the investigative authority and the investigative judge is the prosecutor. The police are not entitled to go before the investigative judge, and at hearings in front of that judge, it is the prosecutor who participates and speaks.<sup>159</sup>

If the investigative authority (in agreement with the prosecutor in charge of the case) considers there are sufficient grounds to identify a suspect, he must inform the suspect of the factual and legal bases of the charge and of his rights and provide an opportunity for him to make statements regarding his view of the law and the facts. The authority must then investigate the suspect’s explanation of events, which may take several months.<sup>160</sup>

The prosecutor must do his best to ensure the investigation is carried out expeditiously. Investigative authorities are expected to put into writing how and what they will investigate and the means and methods to be applied, if the case promises to be more complicated. The prosecutor examines these written plans, comments on them,

152 See Appendices for current data.

153 In the author’s experience during regular “general reviews” or “reviews of criminal law activity,” carried out by prosecutors from the Chief Prosecutor’s offices at district prosecution offices (see Section 2.1 above), prosecutors regularly scrutinize whether or not charges should have been brought rather than a case dismissed on grounds of lack of evidence, especially if the conviction rate at the office under review exceeds the normal 96-97%.

154 This has been the practice in the Budapest Prosecution Office since 1979, when, as a newly appointed Deputy Chief Prosecutor in charge of criminal matters, the author directed a general review at a district prosecution office where the conviction rate was 99%. The point was included as one of the standard items to be scrutinized during such reviews, and was kept among them even after the author’s retirement in 2000.

155 Criminal Procedure Code, 1998, Art. 28(4)(a)–(d).

156 Criminal Procedure Code, 1998, Art. 207.

157 Criminal Procedure Code, 1998, Art. 14(1)(b). As to the powers of the investigative judge, see *id.*, Art. 207(2).

158 Criminal Procedure Code, 1998, Art. 14(1)(a) and (2).

159 Criminal Procedure Code, 1998, Art. 203(1), 207(3), 211(1).

160 By law, it may take no longer than two years. Criminal Procedure Code, 1998, Art. 176(2).



compares the actual investigation to the plans, and if necessary, issues instructions to the police.

When the investigation is formally completed, the files passed to the prosecution office.<sup>161</sup> If the prosecutor in charge of the case and the head of the office find no grounds for dismissal or postponement, the prosecutor in charge issues an indictment, and the Prosecution Office passes it—together with the files—to the court. This is considered “bringing charges” (sometimes referred to in this report as “committal”), and at this point, the court (not the investigating judge) will decide on the issues to be determined. Prosecutors have 30 days to decide whether or not to bring charges; in complicated cases, this term may be prolonged by the head of the office to 60 days, and in extremely complicated cases, the head of the superior prosecution office may extend it to 90 days.<sup>162</sup> Observation of these time frames is regularly monitored, and exceeding them is considered a disciplinary offense.

*Control of Ongoing Prosecution:* In county courts, the prosecutor must always be present at the first instance trial. In local courts, he must be present if the offense tried carries a maximum penalty of five years or more of imprisonment, if the defendant is deprived of liberty or his mental sanity is in doubt, or if the court so orders.<sup>163</sup> The prosecutor may take part in any trial.<sup>164</sup> The trial begins with the prosecutor’s reading of the charges.<sup>165</sup> The prosecutor is entitled to bring motions on any questions to be decided by the court, and to state his desired outcome. He is also entitled to modify the charge or to change the legal basis of the charge (i.e., the Criminal Code provision on which it is based).<sup>166</sup> When the Court has heard the evidence, the prosecutor sums up his views of the facts and the law and recommends a decision and a type of sentence, with reference to aggravating and mitigating circumstances. However, he may not recommend a specific penalty (such as a specific prison term). He must indicate the legal grounds of his recommendation.<sup>167</sup>

After the announcement of the Court’s decision, the prosecutor may immediately appeal or accept the decision; he may also request three days to decide whether or not to appeal. He may appeal against as well as in favor of the defendant.<sup>168</sup>

It is up to the Court to ensure the execution of its decision. The Prosecutor General’s office also has an Independent Department on Inspection of Legality in Execution of Punishments and on Protection of Rights. The Department supervises the work of prosecutors in the Chief Prosecutors’ offices who monitor execution of punish-

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161 Criminal Procedure Code, 1998, Art. 193, 194.

162 In relation to local offices, the respective Chief Prosecutor’s office, in relation to the latter, the Prosecutor General’s office is the “superior prosecution office.” See 25/2003 (ÜK 12) LÜ, General Instruction, Art. 60.

163 Criminal Procedure Code, 1998, Art. 241.

164 Criminal Procedure Code, 1998, Art. 241(1)(f).

165 Criminal Procedure Code, 1998, Art. 284(2)(a). In the absence of the prosecutor (at local court trials) the judge or the recorder will read the indictment. See Criminal Procedure Code, 1998, Art. 342(2).

166 Criminal Procedure Code, 1998, Art. 310, 311.

167 Criminal Procedure Code, 1998, Art. 314, 315(2).

168 Criminal Procedure Code, 1998, Art. 323(1), 325(1), 324.



ments. The prosecution offices' responsibility is limited to regularly checking whether the county court's Bureau on Execution of Punishments (organizational unit of the court) has done its duty, and to ensure that regulations regarding rights of prison inmates be observed. They visit prisons, hear inmates' complaints, investigate them where necessary, and if necessary, take measures to correct the situation.<sup>169</sup>

Clemency may be granted by the President of the Republic. During criminal proceedings, prior to the Court's final decision the Prosecutor General is entitled to advise him to grant clemency.<sup>170</sup>

### 3.2. Relationship with the judge at the pre-trial stage

In the pre-trial phase, prosecutors decide whether or not to commence criminal proceedings; it is exclusively up to them to decide whether or not to bring charges and thereby commit a person to court. Courts are entitled neither to review prosecutorial decisions nor to order additional or supplementary investigations, save to request that the prosecutor, either prior to or during trial, find and obtain some definite proof.<sup>171</sup> However, such requests carry no sanction; rather, they warn the prosecutor that the Court (or the judge; in the local courts, cases are dealt with by a single judge if the maximum penalty is less than 8 years of imprisonment<sup>172</sup>) would like to see some piece of evidence that has been spoken of, but has not been obtained and examined. Such a request also tells the prosecutor that, if the proof sought by the judge is not presented, there is a probability of acquittal.

The only instance in which the prosecutor requires the investigating judge's approval is if he wishes, upon receipt of new information, to reopen an investigation against a person after having discontinued it.<sup>173</sup>

*Pre-Trial Detention:* Prosecutors may decide, in general, what means and measures to apply during an investigation, but if constitutional rights of citizens are affected, judicial authority is required. The investigating authority or the prosecutor may keep a suspect in confinement for 72 hours,<sup>174</sup> during which period they must obtain a judicial arrest warrant. To do so, the investigating authority must formally ask the prosecutor to apply for an order of "preliminary arrest." The prosecutor reviews the

169 See 25/2003 (ÜK.12) LÜ, General Instruction, Art. 17.

170 Criminal Procedure Code, 1998, Art. 597(1). See also 25/2003 (ÜK.12) LÜ, General Instruction, Art. 3(3)(r), 14(1)(g), 15(1)(b), 16(1)(i).

171 Criminal Procedure Code, 1998, Art. 268(1), 305(2).

172 Criminal Procedure Code, 1998, Art. 14(1)(b).

173 Criminal Procedure Code, 1998, Art. 191(3), 207(2)(c).

174 Criminal Procedure Code, 1998, Art. 126(1)–(3). Confinement may be ordered if pretrial detention seems likely. Pretrial detention—which requires a judicial decision after a hearing—may be ordered for suspects charged with crimes punishable by deprivation of liberty, if they: are thought likely to complete an attempted crime or other crime similarly punishable; have previously committed such crimes; have attempted to flee or are thought likely to do so, or will otherwise not be available at trial; or are thought likely to influence or intimidate witnesses or tamper with evidence. See Criminal Procedure Code, 1998, Art. 129(2).

reasons for confinement and decides whether or not to apply for the judicial order. He thus has effective discretion to force the suspect's release; however, the decision in regard to preliminary arrest rests with the judge.<sup>175</sup>

If the prosecutor has not yet brought formal charges, pre-trial detention may be ordered by the investigating judge; if charges have already been brought, its imposition is in the hands of the court. The defense may also participate in pre-trial detention hearings. Instead of pre-trial detention, the judge or court—depending on whether or not charge has been brought—may order domestic confinement or prohibition on leaving the place of residence, or impose bail.<sup>176</sup> Both prosecution and defense may appeal the judge's or court's decisions concerning pre-trial detention or other restraint.<sup>177</sup>

Prosecutors also may apply to courts for other measures restraining personal liberty, such as temporary commitment and treatment of the mentally ill, domestic confinement, prohibition on leaving the place of residence, or withdrawal of passport.<sup>178</sup> All apply only in criminal proceedings.

*Other Surveillance Warrants:* Investigations may require legal search and seizure,<sup>179</sup> seizure of property,<sup>180</sup> or surveillance of private premises, including interception of written or electronic correspondence and wiretapping.<sup>181</sup>

When such measures require a judicial warrant, it is the prosecutor who must apply for it; the investigating authority must request that the prosecutor apply for a warrant.<sup>182</sup> The investigating judge must decide on the motion within 72 hours,<sup>183</sup> and the judge's decision may be appealed. In urgent cases, the head of a prosecution office may authorize the use of such methods for up to 72 hours on his own initiative,<sup>184</sup>

175 Criminal Procedure Code, 1998, Art. 129(1), 207(2)(a), 210(1)(a). The Prosecutorial Investigations Offices can apply for judicial warrants.

176 Criminal Procedure Code, 1998, Art. 137, 138, 147. Bail has only been available since July 2003. Domestic confinement means a prohibition on leaving one's home and its immediate environs without permission. Prohibition on leaving the place of residence means one may not leave a definite (administratively defined) geographic area without special permission.

177 Criminal Procedure Code, 1998, Art. 215(1), 347(1).

178 Criminal Procedure Code, 1998, Art. 146.

179 Criminal Procedure Code, 1998, Art. 129, 137, 138, 140, 146, 147, 149, 151, 153, 158/A. Search and seizure in specified places requires a judicial warrant. Documents may only be seized at the decision of a prosecutor from people who cannot be forced to testify due to a privileged relationship. Otherwise, all the compulsory measures mentioned may be ordered by either the investigating authorities or by the prosecutors or courts.

180 Criminal Procedure Code, 1998, Art. 159.

181 Criminal Procedure Code, 1998, Art. 207(2)(a) and (b).

182 Criminal Procedure Code, 1998, Art. 203(1). See also 23/2003 (VI.24) BM-IM, Joint Ordinance of the Minister of Interior and the Minister of Justice Agreed to by the Prosecutor: *A belügyminiszter irányítása alá tartozó nyomozó hatóságok nyomozásának részletes szabályairól és a nyomozási cselekmények jegyzőkönyv helyett más módon való rögzítésének szabályairól* [On Detailed Regulation of Investigations and on Documentation of Acts of Investigation Otherwise than Protocols at Authorities under the Direction of the Minister of Interior], Art.142(2). In case of prosecutorial investigations, the prosecutor will apply to the investigating judge on his own; he may also instruct the investigative authority to apply these search and seizure and surveillance methods.

183 Criminal Procedure Code, 1998, Art. 214.

184 Criminal Procedure Code, 1998, Art. 203(6). See also 11/2003 (ÜK.7) LÜ, General Instruction by

applying at the same time for a judicial warrant, which may retroactively authorize the measure.

### 3.3. Powers outside the criminal justice system

*Civil Proceedings:* The Prosecution Service has certain powers outside of criminal proceedings, including the power to take actions in civil litigation.<sup>185</sup> Prosecutorial activity in areas of civil law is regulated by the Prosecutor General.<sup>186</sup> A prosecutor may sue on someone's behalf if he is authorized by law to do so, or if the person is unable to protect his or her rights.<sup>187</sup> He may also be entitled by law to take civil actions in the public interest.

A number of special legal rules authorize the prosecutor to institute civil proceedings.<sup>188</sup> The prosecution office is entitled to take action concerning validity of marriage<sup>189</sup> and to limit a person's power to conduct business on grounds of impaired capacity, or to restore it after such limitation.<sup>190</sup> The prosecutor may sue to declare a contract null and void to eliminate the harm done to the public interest by an invalid contract,<sup>191</sup> or in order to take immorally-earned profits for the state.<sup>192</sup> The Prosecution Office may also sue and seek a court order of dissolution if a foundation breaks the law<sup>193</sup> or a political party or other organization operates illegally.<sup>194</sup> It may ask the Court to declare that a political party has ceased to operate and thus no longer exists.<sup>195</sup> Similarly, the Public Prosecution Service is entitled to sue if a church acts illegally in spite of a prior warning.<sup>196</sup> Other laws authorize the service to take legal action in the public interest concerning the Program on Part-Ownership for Em-

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the Prosecutor General: *A vádelőkészítéssel, a bűnügyi nyomozások törvényességi felügyeletével és a vádemeléssel összefüggő ügyészi feladatokról* [On Prosecutorial Tasks Connected to Preparation of Charges, Inspection of Legality of Criminal Investigations and Commitment to Courts of Law], Art. 61.

185 Act V of 1972 On Public Prosecution Service of the Hungarian Republic, Art. 10(2)(b).

186 See 7/1996 (ÜK.7) LÜ: *Az ügyész magánjogi tevékenységéről* [General Instruction of the Prosecutor General on the Civil Law Activity of the Prosecutor].

187 Act III of 1952: *A polgári perrendtartásról* [On Code of Civil Procedure], Art. 9(1); 7/1996 (ÜK.7) LÜ, General Instruction of the Prosecutor General on the Civil Law Activity of the Prosecutor, Art. 8.

188 For details, see Sándor Nyíri, *Az ügyészségről* [On the Public Prosecution Service] (2004), at 135–137.

189 Act IV of 1952: *A házasságról, a családról és a gyámságról* [On Marriage, Family, and Guardianship], Art. 14(1).

190 Act IV of 1959 On Civil Code, Art. 14, 15, 21.

191 Act IV of 1959 On Civil Code, Art. 36.

192 Act IV of 1959 On Civil Code, Art. 594.

193 Act IV of 1959 On Civil Code, Art. 74/F.

194 Act II of 1989: *Az egyesülési jogról* [On Freedom to Form Associations].

195 Act XXXIII of 1989: *A pártok működéséről és gazdálkodásáról* [On Operation and Economization of Parties].

196 Act IV of 1990: *A lelkiismereti és vallásszabadságról, valamint az egyházakról* [On Freedom of Conscience, Religion, and Churches], Art. 13(2).

ployees,<sup>197</sup> Hungarian citizenship,<sup>198</sup> environmental and nature protection,<sup>199</sup> registration of publicly trading companies,<sup>200</sup> etc.

*Review of Legality:* The Prosecution Service supervises the legality of regulations issued by lower levels of government (that is, ministerial ordinances and local self-government ordinances), and decisions of non-judicial organs dealing with labor and service relationships, membership in cooperatives, and labor relationships between cooperatives and individuals. The scope of review covers general instructions and decisions in individual cases, including decisions (or omissions) by administrative authorities. Prosecutors may promote the legality of public administrative actions by commenting on draft regulations and putting questions to administrative authorities. They may also, at the request of interested parties or on their own initiative, monitor or perform prosecutorial reviews of administrative agencies, or comment on final decisions by administrative authorities.

The legal operation of the public administration is considered to be a public concern, and thus the Prosecution Service is entitled to review it. This review does not, as a rule, involve individual cases, and its main form is the prosecutorial “examination,” or review. Prosecution offices, including those at the local and county level, are expected to carry out such reviews every half year, and legal and disciplinary proceedings are a normal consequence of this activity.

Legal reviews<sup>201</sup> are usually designed by the Prosecutor General’s office and involve defined time periods and limited issues; that is, they normally do not involve ongoing supervision of all actions, but only discrete questions about which there is particular concern. However, Chief Prosecutors’ and local prosecution offices may design and perform local reviews. Reviews usually take place at the local and county level administrative authorities, and each county Chief Prosecutor’s office reports its own finding as well as the summarized findings of its subordinate local offices, together with the measures taken. These reports are summarized at the Prosecutor General’s office. The prosecutor reviews solely the legality or constitutionality of administrative decisionmaking, not its political content.<sup>202</sup>

The Public Prosecutor may also review final decisions in individual administrative cases at the request of an interested party, but only from the point of view of legality.

197 Act XLIV of 1992: *A Munkavállalói Résztulajdonosi Programról* [On Program of Employees’ Partial Ownership], Art. 11. This was a mechanism that allowed organizations of employees to gain ownership of formerly state-owned enterprises during privatization.

198 Act LV of 1993: *A magyar állampolgárságról* [On Hungarian Citizenship], Art. 11(3).

199 Act LIII of 1995: *A környezet védelmének általános szabályairól* [On General Rules of Environment Protection], Art. 109(2).

200 Act CXIV of 1997: *A cégnyilvántartásról, a cégnyilvánosságról és a cégbíróvási eljárásról* [On Registration and on Publicity of Trading Companies and on Registration Procedure at Courts], Art. 52(1)(a).

201 These are officially called “examinations,” during which each of a defined group or type of cases in a defined period at a specific public administrative office is scrutinized by the prosecutor’s office to determine legality.

202 Act V of 1972 On Public Prosecution Service of the Hungarian Republic, Art. 13(1), 13(2)(a)–(b), 16(1). See also Nyíri, *supra* note 188, at 125.

If a prosecutor determines that an administrative action violates the law, he may:

- ▶ *lodge a protest* concerning an unfounded or unlawful individual decision, whether it is disclosed due to prosecutorial review of a specific issue or to review of an individual administrative case at the request of an interested party;<sup>203</sup>
- ▶ *remonstrate* against an illegal practice or a breach of legality by omission; this applies if the decisions are not illegal on the merits, but procedural rules are regularly violated, which creates the direct danger of illegal decisions in future cases on the merits as well;
- ▶ *issue a warning*, if there is a threat of future breach of legality;<sup>204</sup>
- ▶ *initiate proceedings*, if the prosecution office—as a result of the prosecutorial review of a number of individual administrative cases—discloses that a criminal or disciplinary offense or violation seems to have been committed and there has been no proper proceeding (because the competent authority has not been notified). In case of a criminal offense, the prosecutor orders investigation; in case of a violation or a disciplinary offense, it notifies the competent authority, which must proceed, but is not limited in its decision by the prosecutor’s legal opinion.<sup>205</sup> Such proceedings are not uncommon;
- ▶ *annul* administrative organs’ punishments for minor infractions (“contraventions”).<sup>206</sup>

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## IV. Relationship of the Public Prosecution Service to Other Organs of the State

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### 4.1. The constitutional location of the Public Prosecution Service

The Hungarian Republic is a constitutional parliamentary democracy. The Constitution is the supreme and defining law of the land.<sup>207</sup> The country is administratively

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203 Act V of 1972 On Public Prosecution Service of the Hungarian Republic, Art. 13/A.

204 Act V of 1972 On Public Prosecution Service of the Hungarian Republic, Art. 16.

205 Act V of 1972 On Public Prosecution Service of the Hungarian Republic, Art. 26.

206 These are minor, administrative infractions dealt with by administrative organs (notary of the local self-government, police, specialized organizations of supervision and control). They may be punished by fine of between HUF 1000 and 150,000, but some are punishable by up to 60 days’ deprivation of liberty; other possible penalties include confiscation of property, withdrawal of licenses, etc. See Act LXIX of 1999: *A szabálysértésekről* [On Contraventions]. A decision of the competent authority may be appealed to the prosecutor, who in case of illegality or unfoundedness may annul it and instruct the competent authority to proceed properly.

207 The Constitution of the Hungarian Republic was first adopted by Act XX of 1949. The Constitution was modified completely following the end of the communist system in 1989; its new text was established by Act XXXI of 1989. See also Act XI of 1987: *A jogalkotásról* [On Legislation]. All references are to the new text.

divided into 19 counties, a number of cities with or without county privileges, and townships. Budapest has a separate administrative structure of districts.<sup>208</sup>

Legislative authority is vested in a unicameral Parliament.<sup>209</sup> The President is elected by Parliament and holds a largely symbolic position.<sup>210</sup> The Prime Minister is elected with the advice of the President by a majority of Parliament, and ministers are appointed by the President with the advice of the Prime Minister.<sup>211</sup> The government administers national policy and answers to Parliament.<sup>212</sup>

Judicial authority is vested in a series of courts. The Chief Justice—the President of the Supreme Court—is elected on the advice of the President by a two-thirds majority of Parliament for a six-year term, with the possibility of re-election. Judges are appointed by the President, with the advice of the National Council of Justice Administration.<sup>213</sup>

The Public Prosecution Service is a constitutionally regulated body<sup>214</sup> independent of the executive and the judiciary. It is headed by a Prosecutor General, who is elected by and accountable to Parliament. The Prosecution Service is charged with protecting citizens' rights and upholding the constitutional order and security of the country; prosecutors are responsible for ensuring the application of the law.<sup>215</sup>

#### 4.2. *Relations with the legislature*

The Prosecutor General is constitutionally accountable to Parliament for the activity of the Prosecution Service. However, Parliament's apparent influence over the highly autonomous Prosecution Service is actually limited, especially where individual cases or decisions are concerned.

Parliament elects the Prosecutor General<sup>216</sup> and may remove him from office on specified grounds (though only at the President's recommendation).<sup>217</sup> However, the Prosecutor General's relatively long term of office<sup>218</sup> and the limited grounds available

208 Act XX of 1949 On Constitution of the Hungarian Republic, Art. 41; Act XLII of 1994: *A helyi önkormányzati képviselők és polgármesterek választásáról szóló 1990. évi LXIV tv. Módosításáról* [Amendment to the Constitution in Regard to Local Self-Government], Art. 2 (appendices to the Act describe the territorial division of the cities, including Budapest).

209 Act XX of 1949 On Constitution of the Hungarian Republic, Art. 19–28/E.

210 Act XX of 1949 On Constitution of the Hungarian Republic, Art. 30/A.

211 Act XX of 1949 On Constitution of the Hungarian Republic, Art. 33.

212 Act XX of 1949 On Constitution of the Hungarian Republic, Art. 39.

213 Act XX of 1949 On Constitution of the Hungarian Republic, Art. 48. The National Council is described in Section 4.6 below.

214 Act XX of 1949 On Constitution of the Hungarian Republic, Art. 51–53.

215 Act XX of 1949 On Constitution of the Hungarian Republic, Art. 51(1)–(3).

216 Act XX of 1949 On Constitution of the Hungarian Republic, Art. 52(1).

217 See Section 2.3 above.

218 As Parliament serves no more than a four-year term, and the Prosecutor General is elected for a six-year term, it is possible for a prosecutor to serve under a parliament with a different political composition. The first Prosecutor General of the post-communist Republic of Hungary was elected in June 1990 with 82% of the vote, and re-elected in 1996 with 94% of the vote. He resigned in March



for his removal tend to limit Parliament's political influence over him. Moreover, Parliament has no control over the appointment or activities of any other prosecutors.

Parliament can influence the Prosecution Service through legislation, such as laws establishing regulations for the Service,<sup>219</sup> and through the budgetary process.

Parliament may also solicit information from the Prosecution Service under limited conditions. The Prosecutor General must report to Parliament on the performance of the Prosecution Service, but the form, content, and status of this report are poorly defined.<sup>220</sup> In the period since 1993 the Parliament in plenary session has had the time to examine, discuss and formally accept only one of the 13 annual reports.<sup>221</sup>

Members of Parliament may request information from the Prosecutor General through questions and interpellations.<sup>222</sup> However, the Prosecutor General is not politically responsible to Parliament for his individual decisions, and there are no

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2000. The former opposition took over in 1994 and again in 1998. The current Prosecutor General was elected with 55% of the vote and has served since May 16, 2000. The former opposition took over two years later, in 2002. Because the current Prosecutor General has only a fragile majority, he is frequently accused of partisanship and enjoys less legitimacy than his predecessor.

219 Act XX of 1949 on Constitution of the Hungarian Republic, Art. 53(4). See also Act V of 1972 On Public Prosecution Service of the Hungarian Republic and Act LXXX On Service Relationships.

220 The form the report has taken is largely the result of an *ad hoc* process of development controlled by the Prosecution Service itself. In the transition period following the 1989 change of system, the Prosecutor General felt he owed Parliament a more detailed account of those stormy years than the former "Prosecutor General's account," a cursory 20-page quadrennial report. A governmental initiative to change the constitutional status of the Public Prosecution Service and to subordinate it to the government through the Ministry of Justice had failed by 1993 for lack of the necessary two-thirds majority in Parliament. The Standing Committee on Constitutional Matters and on Preparation of Legislative Acts expressed its view that the Constitution required the Prosecutor General to provide a report: (a) before Parliament's term elapsed (at least once), (b) before the Prosecutor General's term elapsed (at least once) and (c) if Parliament so desired. It also said that the Prosecutor General was entitled to submit a report at any time. Parliament gave no sign of any expectation as to a report, not to mention its content. In 1993, as the term of the first freely elected Parliament was about to expire, the Prosecutor General submitted a report on the Service's performance for the previous three years. The structure and the content of this report were devised by the Prosecutor General's office, and all the Chief Prosecutors' offices (in each county and the capital) provided input on their regions' performances.

221 Since 1993, reports had been submitted to the Parliament each year, and were discussed only in committees. The report on the year 1997 was completed and filed in Parliament in May 1998 and heard in committee in February 1999. It was examined in plenary session on March 5, 1999 and decided upon on March 23, 1999. All speakers emphasized the importance of the report and the necessity of discussing similar reports in plenary. The report was accepted by 297 votes with 1 vote against and 10 abstentions. See *Országgyűlési jegyzőkönyv 1998-2002, tavaszi ülésszak, II. kötet (1999. március 1-5., 51-52. ülésnap) 7244-7484. hasáb és III. kötet (1999. március 22-26., 56-60. ülésnap) 7554-7555. hasáb* [Record of the Parliament of 1998-2002., 1999 Spring Session. Vol. II, Columns 7244-7284 and Vol. III, Columns 7554-7555].

222 According to the Act XX of 1949 On Constitution of the Hungarian Republic, Art. 27, Members of Parliament are entitled to interpellate and put questions to various government officials, including the Prosecutor General, on any matter within their purview. The details are regulated in a Resolution of Parliament 46/1994 (IX.3§) OGY: *A Magyar Köztársaság Országgyűlésének házszabályáról* [On the Rules of Operation of the Houses of Parliament of the Hungarian Republic]. Both interpellations and questions must be answered by the addressee in person or by a deputy. In case of an interpellation, an MP may reject the answer, and Parliament then votes on whether it is satisfied by the answer. In case of a question, there is no right to rebut and no voting.



consequences if Parliament votes to reject his answer.<sup>223</sup> Apart from these general informational requirements, Parliament is not entitled to conduct independent investigations of either the Prosecution Service as a whole or individual prosecutors. Even the questions or interpellations—though they may concern individual cases—may not concern individual public prosecutors. They may, however, deal with the Prosecutor General's personal involvement in a case—whether or not he gave any specific instructions, whether he agreed with the legal resolution, and similar questions.

### 4.3. Relations with the executive

The executive has very limited influence over the Prosecution Service. The Prosecutor General does not report to the government or to any executive agency, and no minister or anyone else within the executive has any power of appointment or control over him or other prosecutors. Neither individual prosecutors nor the Prosecution Service as a whole receive general instructions on law enforcement priorities or specific instructions in individual cases.

Likewise, prosecutors have no power to give instructions or orders to executive agencies—save those addressed to investigative authorities in individual cases concerning definite investigative actions. In addition, prosecutors have authority to review and supervise legality in public administration.

The Ministry of Justice supervises the National Headquarters of Prison Administration and the Probation Service, keeps registers of officially licensed experts, interpreters and public notaries, organizes the technical and professional side of the preparatory work of legislation, and operates the Committee on Special Legal Examination.<sup>224</sup> It has nothing to do with the Prosecution Service, except that both the Prosecution Service and the Ministry of Justice are professionally interested in good laws. In preparing draft legislation on behalf of the Government, the Ministry of

<sup>223</sup> In response to a motion filed by the Prosecutor General after his responses to various interpellations concerning specific criminal cases were not accepted, the Constitutional Court ruled:

“The Prosecutor General, who was elected to this office by the Parliament, shall not be considered politically responsible to Parliament for individual decisions made by him while performing his duties. Accordingly, the Prosecutor General's public law status is not affected by Parliament's rejection of his answer to an interpellation. Due to his constitutional position and to the function of an interpellation, he must not be called to account in case his answer to the interpellation is not accepted. The Prosecutor General is not subordinated to the Parliament. Consequently, the Prosecutor General may neither directly nor indirectly be instructed to make any individual decision with definite content or to change an individual decision (in any definite way).”

See 3/2004 (II.17) AB, Decision of the Constitutional Court of Hungary: *Az Alkotmánybíróság határozata a legfőbb ügyésznek az Alkotmány értelmezése tárgyában előterjesztett indítványára* [On the Prosecutor General's Motion Regarding the Interpretation of the Constitution].

<sup>224</sup> See Section 2.4 above.

Justice must invite comments and the opinion of the Prosecutor General's office.<sup>225</sup> Conversely, the Prosecutor General may initiate legislation, but may do so only through the Minister of Justice.<sup>226</sup>

#### 4.4. Relations with police and investigators

The police of the Hungarian Republic (*a Magyar Köztársaság Rendőrsége*) conduct most criminal investigations. The Prosecution Service also has separate units (Prosecutorial Investigation Offices) for criminal investigation.

The police are a uniformed, armed body under the direction of the government through the Minister of the Interior.<sup>227</sup> The National Chief of Police, usually a police general (police have military ranks), is appointed by the Prime Minister on the advice of the Minister of the Interior. Within the National Police Headquarters (*Országos Rendőrfőkapitányság*), the High Directorate on Criminal Matters deals with criminal matters.

The police and the Prosecution Service are administratively separate. The Prosecution Service has no authority over the appointment, training, evaluation, or promotion of investigating police officers. However, because the Prosecution Service makes the final decisions on cases investigated by police officers, prosecutorial evaluations of an officer's investigative abilities and performance are often informally reflected in prosecutorial decisions. In addition, prosecutors regularly lecture in refresher courses for police officers.

Disciplinary actions against police officers are conducted independently of the Prosecution Service. However, prosecutors can compel the initiation of disciplinary proceedings if they find in the course of their official duties that a disciplinary offense has been committed, although the police disciplinary authority remains free to decide the case.<sup>228</sup>

*Investigative Authority:* The police may commence a criminal investigation on their own initiative whenever they are aware of a crime;<sup>229</sup> however, as discussed above, they must report their investigation to the prosecutor,<sup>230</sup> who may take it over at his discretion.<sup>231</sup>

The Prosecution Service may assign cases to the police for investigation to determine whether criminal charges are warranted.<sup>232</sup> Investigations conducted by the police are

225 Act V of 1972 On Public Prosecution Service of the Hungarian Republic, Art. 5(2)(b); Act XI of 1987 On Legislation, Art. 28.

226 Act V of 1972 On Public Prosecution Service of the Hungarian Republic, Art. 5(2)(b).

227 Act XXXIV of 1994: *A Rendőrségről* [On Police], Art. 4(1).

228 Act V of 1972 On Prosecution Service of the Hungarian Republic, Art. 26.

229 Criminal Procedure Code, 1998, Art. 35(2).

230 Criminal Procedure Code, 1998, Art. 156(2). See also Section 3.1 above.

231 Criminal Procedure Code, 1998, Art. 28(4)(e).

232 Criminal Procedure Code, 1998, Art. 28(3). When doing so, the Prosecution Service must observe the regulations in 15/1994 (VII.14) BM, Ordinance of the Minister of Interior: *A rendőrség nyo-*

subject to review, supervision, and direction by the Prosecution Service.<sup>233</sup> It may order the police to take specific actions relating to the investigation,<sup>234</sup> which police officers are required to obey,<sup>235</sup> and the prosecutor in charge of the case may examine any investigative records.<sup>236</sup>

The prosecution office corresponding to the same level of territorial organization as the responsible police office has supervisory authority, and no other agency has any right to direct or control the investigation.<sup>237</sup>

Prosecutors may also conduct their own investigations,<sup>238</sup> and certain offenses relating to political figures, members of the judiciary and Prosecution Service, or police officers may only be investigated by the Prosecution Service.<sup>239</sup>

Prosecutorial investigations are conducted by the Prosecutorial Investigations Offices (PIO), which are prosecution offices at the local level in each county. There are also a Metropolitan Prosecutorial Investigations Office in Budapest and a Chief Prosecution Office of Prosecutorial Investigations (*Nyomozó Főügyészség*) with jurisdiction over the entire country.<sup>240</sup> The Chief Prosecution Office of Prosecutorial

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*mozó hatóságainak hatásköréről és illetékességéről* [On Competence and Jurisdiction of the Investigative Authorities of the Police].

233 Criminal Procedure Code, 1998, Art. 28(4), Art. 165(1)–(3).

234 Criminal Procedure Code, 1998, Art. 165(1).

235 Criminal Procedure Code, 1998, Art. 165(2). See also 23/2003 (VI.24) BM-IM, Joint Ordinance of the Minister of Interior and the Minister of Justice Agreed to by the Prosecutor General On Detailed Regulation of Investigations and on Documentation of Acts of Investigation Otherwise than Protocols at Authorities under the Direction of the Minister of Interior, Art. 91(1). Under this Ordinance, police commanders are expected to promote prosecutorial supervision, and to ensure obedience to prosecutorial instructions, even in cases of disagreement.

236 Criminal Procedure Code, 1998, Art. 165(1).

237 Act XX of 1949 On Constitution of the Hungarian Republic, Art. 51(2).

238 Criminal Procedure Code, 1998, Art. 28(4)–(e).

239 Offenses against public officials or committed by high ranking officials with immunity; offenses against foreign officials; murder, assault and other serious crimes against judges, prosecutors, or other employees of the justice administration, such as draftsmen at courts (the equivalents of the assistant public prosecutors), assistant public prosecutors, prosecutorial investigators, secretaries at courts or prosecution offices, clerks at courts and at Public Prosecution Service, bailiffs, public notaries and deputies to them; cases of bribery involving judges, prosecutors, or other high-ranking officials; offenses committed by policemen or officers of the Civil Security Services, the National Security Bureau, the Information Bureau, the Special Services for National Security, or Customs Guards; or offenses against the administration of justice, such as false accusation or perjury. Criminal Procedure Code, 1998, Art. 29.

240 See Act VII of 2006: *A Magyar Köztársaság Ügyészségéről szóló 1972. évi V. törvény és az ügyészségi szolgálati viszonyról szóló 1994. évi LXXX. törvény módosításáról* [On Modification of the Act V of 1972 On Public Prosecution Service of the Hungarian Republic and Act LXXX On Service Relationships], Art. 1. Chief Prosecution Office of Prosecutorial Investigations conducts the investigation if the suspect or the victim is a person with immunity; in cases of murder, intentional manslaughter, kidnapping, assault or robbery of a judge or professional employee of the Prosecution Service; offenses committed by judges or professional employees of the Prosecution Service in connection with the administration of justice; murder or intentional manslaughter of a policeman; bribery of a judge or an employee of the Prosecution Service; or cases in which the suspect is a high ranking officer of the Police or the Customs Guard. See 11/2003 (ÜK.7) LÜ, General Instruction by the Prosecutor General On Prosecutorial Tasks Connected to Preparation of Charges, Inspection of Legality of Criminal Investigations and Commitment to Courts of Law, Art. 49(2). The scope of offenses specified in Art. 49(2) of this General Instruction is much narrower than in Art. 29 of the

Investigations is not a coordinating organ for the offices of prosecutorial investigations, but an investigative authority in itself; it conducts investigations of the more serious criminal offenses listed in Article 29 of the Criminal Procedure Code and referred for investigation under that article to the Prosecution Service. The Prosecutor General or his deputy for criminal matters, or the head of the Division on Inspection of (Criminal) Investigations and Preparation of Commitment to Courts of Law in the Prosecutor General's office, may assign any case to the Chief Prosecution Office for investigation.<sup>241</sup> The Offices of Prosecutorial Investigations—including the CPOPI—are part of the prosecution service. They employ prosecutors, assistant prosecutors, and prosecutorial investigators who are appointed by the Prosecutor General and are responsible to him. They follow the same rules of criminal procedure and investigate using the same methods as the police, but are used only in cases required by law to be investigated by the prosecution service.

The media have frequently noted dissent and lack of proper cooperation between the police and the Prosecution Service.<sup>242</sup> Reports have appeared of politically-motivated interference by prosecutors in police investigations, but it is not clear whether these incidents are the result of abuse or of mere tactlessness or lack of caution on the part of prosecutors.<sup>243</sup> Some cases related to this have come up, but all have been dismissed by the police or prosecutors.

*Other Police Work Subject to Prosecutorial Oversight:* The police are also responsible for public administrative tasks such as issuing firearms licenses, drivers' licenses, and licenses to bury victims of sudden death or suicide (like a coroner). They also have the authority to decide certain cases of more minor infractions, for which they may impose fines or jail time. In their conduct of these activities, the police are subject to supervision by the Prosecution Service.<sup>244</sup> This supervision generally functions smoothly in practice.

In addition to the police and the Prosecution Service, both the Customs Guard and the Frontier Guard possess investigative powers in criminal cases.

The Customs Guard is an administrative and law enforcement agency that may conduct investigations involving tax and revenue fraud, smuggling, breaches of international obligations concerning prohibited goods or technologies, trafficking in drugs, and forgeries of documents and trademarks.<sup>245</sup> It is under the general supervision

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Criminal Procedure Code. Only the most serious categories of crimes are referred to the CPOPI, leaving the rest—e.g. murder of a public notary or bribery not committed by a judge, prosecutorial staff member or high ranking police officer—to the county prosecutorial investigations offices.

241 11/2003 (ÜK.7) LÜ, General Instruction by the Prosecutor General On Prosecutorial Tasks Connected to Preparation of Charges, Inspection of Legality of Criminal Investigations and Commitments to Courts of Law, Art. 49(2)(g).

242 Endre Babus, *Ügyészség kontra rendőrség, Heti Világgazdaság*, October 25, 2003, at 6–9; N. Péter Nagy, *Fogadjunk az igazságra?, Népszabadság*, November 2, 2004, at 3.

243 On one specific case of apparent prosecutorial interference in a police investigation, see János Tamás Szalay, *Kulcsár, az ügyész és a szökés, Népszava*, September 4, 2003, at 1, 3. See also *Perel a Legfőbb Ügyészség*, available at <http://www.radio.hu>, last reviewed December 7, 2005; *Népszabadság Online*, available at <http://www.nol.hu>, last reviewed February 22, 2006.

244 Act V of 1972 on Public Prosecution Service of the Hungarian Republic, Art. 17, 17/A.

245 Criminal Procedure Code, 1998, Art. 36(2).

of the Finance Ministry,<sup>246</sup> but answers directly to the National Commander of the Customs Guard, who is a customs guard general (here too, ranks track those of the military). The Customs Guard is organized regionally.<sup>247</sup> A national headquarters with a specialized Captaincy of Central Criminal Intelligence and Investigations coordinates and supervises criminal investigations performed by the investigation offices in regional offices.

The Frontier Guard is an armed and uniformed organization with a number of administrative tasks, including powers and duties to conduct criminal intelligence and investigations.<sup>248</sup> It can investigate criminal cases of illegal entry into or stay in the country, smuggling of human beings, damage to frontier marks, and forgery of passports. The Frontier Guard operates under the direction of the Minister of the Interior and is directly headed by the National Commander of the Frontier Guard, who is a general of the Guard.<sup>249</sup> It is organized along regional lines. Its national headquarters contains a specialized unit to deal with intelligence and criminal investigations, and similar units are found at regional headquarters.

The Prosecution Service's relationship to the Frontier Guard<sup>250</sup> and Customs Guard<sup>251</sup> is similar to its relationship to the police. All belong to the executive, and each functions as an investigating authority. Prosecutors are entitled to monitor and supervise investigations by each agency, may assign investigations to either, instruct officers in their investigations, and review investigative documents from both. Prosecutors may also take over their investigations.<sup>252</sup> If police authority overlaps with that of the Customs or Frontier Guard, the respective (county) Chief Prosecutor's office decides which authority should proceed.<sup>253</sup>

#### 4.6. Relations with the judiciary

The Prosecution Service and the judiciary are entirely separate services, with separate administrative structures and budgets. The judiciary is a self-governing body

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246 Act XIX of 2004: *A Vám- és Pénzügyőrségről* [On Customs Guard], Art. 1(1).

247 24/2004 (IV.23) PM, Ordinance of the Minister of Finance On Execution of the Act XIX of 2004 On Customs Guard.

248 Act XXXII of 1997 On Surveillance of the State Border and the Frontier Guard, Art. 43, 54.

249 Act XXXII of 1997 On Surveillance of the State Border and the Frontier Guard, Art. 24.

250 See 23/2003 (VI.24) BM-IM, Joint Ordinance of the Minister of Interior and the Minister of Justice Agreed to by the Prosecutor General On Detailed Regulation of Investigations and on Documentation of Acts of Investigation Otherwise than Protocols at Authorities under the Direction of the Minister of Interior. This Ordinance relates to both the Police and the Frontier Guard, as both are "under the direction of the Minister of Interior."

251 17/2003 (VII.1) PM-IM, Joint Ordinance by the Minister of Finance and the Minister of Justice Agreed to by the Prosecutor General: *A pénzügyminiszter irányítása alá tartozó nyomozó hatóságok nyomozásának részletes szabályairól és a nyomozási cselekmények jegyzőkönyv helyett más módon való rögzítésének szabályairól* [On Detailed Regulation of Investigations and on Documentation of Acts of Investigation Otherwise than Protocols at Authorities under the Direction of the Minister of Finance].

252 Criminal Procedure Code, 1998, Art. 29(4)(e).

253 Criminal Procedure Code, 1998, Art. 37(2).

under the direction and supervision of the National Council of Justice Administration.<sup>254</sup> The Prosecutor General is a voting member of the National Council, and thus has some influence on the administration and career paths of judges, although he is only one of many members.

The *organizational* independence of the judiciary and the Prosecution Service are similar; each institution is independent of the executive and legislative branches. The *individual* independence of judges and prosecutors is somewhat different.

Individual judges are independent and subject only to the law; they may not be instructed or improperly influenced from outside in regard to their decision-making.<sup>255</sup> However, in matters concerning purely the organization of work (assignment of offices, hours worked, etc.), rather than decision-making, judges may be instructed by the President of the Court.<sup>256</sup> The president's instructions in this regard are binding.

In contrast, while the Prosecutor General is independent of the executive and the judiciary, the Prosecution Service he heads is a hierarchical organization in which he plays a decisive role. There is no "governing body" with participation of outsiders to direct or control the Public Prosecution Service. All prosecutors may be instructed by their official superiors through the chain of command,<sup>257</sup> even in core decisional matters.

The career paths of judges and prosecutors are separate but very similar. The eligibility requirements concerning education, training, practical skills, and character for membership in the two organizations are similar.<sup>258</sup> There is practically no difference in salaries for judges and prosecutors of similar standing.<sup>259</sup>

The cities in which the majority of local courts and local prosecution offices can be found are small townships, with 15-25,000 inhabitants and one or two judges handling criminal cases in local courts. At the local prosecution offices, there are also a

254 Act XX of 1949 On Constitution of the Hungarian Republic, Art. 50 (4); Act LXVI of 1997: *A Magyar Köztársaság bírósági szervezetéről és a bíróságok igazgatásáról* [On Organization and Administration of the Courts of Law], Art. 34, 35. *Ex officio* members of the National Council are the Chief Justice (the President of the Council), the Minister of Justice, the Prosecutor General, the President of the National Bar Association and two Members of Parliament, delegated by the Standing Committees on Constitutional and Justice Administration and on Budgetary and Financial Matters. Further members of the National Council are nine judges, who are elected by delegates of the judiciary. The Council also has a secretariat, *see* Act LXVI of 1997 On Organization and Administration of the Courts of Law, Art. 34(3).

255 Act XX of 1949 On Constitution of the Hungarian Republic, Art. 50(3); Act LXVI of 1997 On Organization and Administration of the Courts of Law, Art. 3.

256 Each Court of Law is administered by a President of the Court who is responsible for the legally correct and effective operation of the organizational unit. He/she must be a judge and is appointed to this position (and task) for 6 years by the National Council of Justice Administration. *See* Act LXVI of 1997 On Organization and Administration of the Courts of Law, Art. 61, 63–69, 70–72.

257 Act V of 1972 On Public Prosecution Service of the Hungarian Republic, Art. 6(1).

258 The eligibility requirements for judges are Hungarian citizenship, a clean record, the right to vote, university law degree, special legal examination, property declaration, one year practice as court secretary or its equivalent as specified. *See* Act LXVII of 1997: *A bírák jogállásáról és javadalmazásáról* [On Legal Status and Remuneration of Judges], Art. 3(1)(a)–(g). The requirements for prosecutors are the same, *see* Act LXXX On Service Relationships, Art. 14(1), (4), and (5).

259 Act LXVII of 1997 On Legal Status and Remuneration of Judges, Art. 101–120; Act LXXX On Service Relationships, Art. 46/A–50/E.



limited number of prosecutors (2-3) dealing with oversight of investigation, supervision of cases, and first instance trial advocacy. The prosecutor's office is usually located in the courthouse.

Prosecutors and judges may be graduates of the same university even if they were not in the same course of study, so they may know each other from law school or college. The Union of Hungarian Judges (*Magyar Bírói Egyesület*) and the National Association of Prosecutors (*Országos Ügyészi Egyesület*) are organized on the basis of profession; the Association of Hungarian Lawyers (*Magyar Jogász Egylet*) is organized on the basis of the legal profession as a whole. Other scholarly societies, such as the Hungarian Society on Criminology, may have both judges and prosecutors as members. These associations organize professional meetings and social events.

Prosecutors and judges also may follow similar career paths. They may serve at a local court or a prosecution office in a small town until retirement; or they may spend some years at the lower levels and then apply to become judges or prosecutors at a higher level court or prosecutor's office; or, after having served as judges or ordinary prosecutors at different levels, they may apply for a leading position (presidency of a court or head of a prosecution office). The duration of service may entitle a judge to apply for a leading position in the prosecution service, or vice versa; however, it is very rare for a judge to transfer to prosecution or a prosecutor to the judiciary.

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## V. Information Control

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*Information Control:* There is no general right of public access to investigative information. Detailed regulations exist concerning publication and processing of statistics and personal data that limit the Prosecution Service's interactions with the media and the general public. The authority actually conducting the investigation (including the Prosecutorial Investigations Offices) decides which data may be made public and which kept confidential.<sup>260</sup> Prosecutors and officers of other investigative authorities, of course, may not release information classified as "secret" or "top secret."

Prosecutors supervising an investigation are not allowed to inform the public about the details of the investigation, the actual activity and results, or the plans of the investigative authority (e.g. the police or the Prosecutorial Investigations Office). The supervising prosecution office limits information issued in such instances to

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<sup>260</sup> At the Police Academy, "secrecy of investigations" is a subject of study, and special procedures exist regarding conditions and procedure for classifying information as secret. See Act LXV of 1995: *Az államtitokról és a szolgálati titokról* [On State and Service Secrecy], especially Art. 3, 4 on definitions and Art. 7–9 on the procedure of qualification. The overwhelming majority of data acquired in investigations does not fall within any category of official secrets, however, though as a matter of professional practice and discretion, information often is not disclosed, so as to maintain the integrity of investigations.



the details of strictly prosecutorial activity, such as decisions on complaints against measures taken by the investigative authority, the laws involved in the case, and the reasoning behind the interpretation of these legal rules.

Once charges are brought, the duty to inform the public is transferred to the courts. The prosecutor's informational activity takes place in the courtroom in the form of public questions, comments, motions and speeches. Consequently, prosecutors have nothing to impart to the news media during the trial phase. The media may, of course, report on the prosecution office's (or the responsible public prosecutor's) public and official actions,<sup>261</sup> but journalists may not be informed of its strategy, so they may report only on the prosecution's *supposed* strategy.

*Public Relations:* Official spokesmen are attached to the Prosecutor General's and the county Chief Prosecutors' offices.<sup>262</sup> They are public prosecutors charged with handling public relations and maintaining contact with the press. However, in general the head of each individual prosecution office is entitled to speak publicly on its behalf. Often the particular prosecutor in charge of an individual case will be authorized by the head of office to inform the general public about that case. The Chief Prosecutor is expected to be aware of the more important cases in his jurisdiction, regardless of which office they are processed by; consequently he—or the spokesman for his office—may provide information on the case. However, if the case is dealt with by a local office, the Chief Prosecutor or his spokesman may direct the media to the competent local office.<sup>263</sup> A lower level office normally may not speak on behalf of a superior, and an ordinary prosecutor may not speak on behalf of the office. Officials are authorized to speak only within the framework of their responsibilities. Superiors at different levels are entitled to reserve some issues exclusively to themselves.<sup>264</sup> The Prosecutor General and heads of offices determine the information policy.

*General Public and Media Opinion:* The media has often been very critical of, even hostile to, the Prosecution Service, and in particular to some prosecutors, and to prosecutorial actions and decisions. This began in 2000, when the new Prosecutor General was elected by majority vote, without any attempt to find someone for the post who would also be acceptable to the opposition.

Even before the 2002 elections, many cases were publicized suggesting that the governing majority, with the help of friendly businessmen, had obtained money illegally

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261 It is considered improper for a prosecutor to make unofficial statements or remarks, in private, concerning a case.

262 Regional Chief Prosecutors' offices are not large, and the media is not particularly interested in them. Therefore, public relations there may be dealt with by the normal staff (the Chief Prosecutor or prosecutor in charge of the case).

263 Public prosecutors are not eager to be interviewed by the media. They tend to believe that journalists are after "stories" rather than facts, and are therefore inclined to yield to fantasy instead of proof. Behind this attitude is the experience that journalists have a point of view of their own in regard to what the prosecution considers "proof," and their views are not necessarily the same as those of the prosecutors.

264 When the statistics on the previous year are ready, the Prosecutor General holds a press conference and provides an overview of prosecutorial performance, trends in crime, etc. Prior to this press conference, leaders of lower level prosecution offices may not provide such information, even if the respective data for their jurisdictions is available to them.

and that the truth was not disclosed as a result of the Public Prosecutor's passivity. However, these reports might have been politically motivated. In the general elections of 2002, the former opposition took over and pressure increased on the Prosecutor General and the Prosecution Service, because the parliamentary majority regularly provided material for the media by rejecting the Prosecutor General's answers to interpellations.<sup>265</sup> Since then, the media has been even more hostile to the Prosecutor General and the Prosecution Service.

Prior to 2002, the opposition succeeded in initiating several investigations of acts it considered to be criminal, and accused the prosecutor of inactivity due to the lengthy investigations. When the former opposition took over the government, they continued to accuse the previous government of crimes while governing, and many contracts were dug up as evidence of embezzlement of public money. A number of criminal investigations were initiated by the police. A majority of these cases were dismissed by either the Public Prosecutor or the police following the Prosecutor's instructions.<sup>266</sup>

The majority of the press had criticized the previous government regarding the administration of justice and the postponement of the 1997 judicial reform,<sup>267</sup> and when representatives of the Association of Hungarian Judges, the National Union of Prosecutors and the Bar Association issued a statement voicing their concerns that the independence of the administration of justice was endangered, there was a strong response in the press.<sup>268</sup>

Press coverage of cases with politically-tinged backgrounds has also caused tensions between the police and the Prosecution Service. Publications have presented an overview of cases with political backgrounds that were investigated by the police and—though the police recommended bringing charges—dismissed by the Prosecution Office.<sup>269</sup> Members of the Prosecution Service and the police gave statements anonymously and without authorization, so that distrust developed in the everyday relationships between some officers and prosecutors. Questionable incidents occurred

265 The Prosecutor General requested a ruling from the Constitutional Court on the issue of interpellations. When the decision was made, *see supra* note 223, the Prosecutor General's sixteenth answer to one of interpellations had just been rejected by Parliament. *See AB-döntés Poltról, Heti Világgazdaság*, February 2, 2004, at 12. *See also* Endre Babus, *Polt Péter a célkeresztben, Heti Világgazdaság*, June 22, 2002, at 82, 83.

266 *Megszüntetett Országimázsügy, Heti Világgazdaság*, September 9, 2003, at 13.

267 Which resulted in adoption of the Act XLVI of 1997 On Organization and Administration of the Courts of Law and the Act LXVII of 1997 On Legal Status and Remuneration of Judges.

268 *Vita az igazságszolgáltatás függetlenségéről – A hallgatás törvénye?*, *Heti Világgazdaság*, January 5, 2002, at 81, 82. One of the signatories, the President of the National Union of Prosecutors—formerly a well-known leading prosecutor in a local prosecution office—was relieved of his position by the Prosecutor General within 48 hours. The article referred to the fact that he had prosecuted a businessman who was famous for having financed the election campaign of the leading party in the coalition (the person in question was convicted of smuggling and sentenced to imprisonment, though he had fled overseas); it also referred to other cases in which people close to the coalition had been investigated by police with no success and still others in which people with ties to the coalition—or to the government itself—suddenly won.

269 Zoltán Simon, *Közpénzek, feljelentések, ügyészégi elutasítások, Népszava*, July 23, 2003, at 8.

that, in this hostile political atmosphere, could rarely be explained satisfactorily.<sup>270</sup> The media began to pose constitutional questions regarding the Public Prosecutor's independence from the government and whether it might not be preferable to have a prosecution service directed and supervised by the Ministry of Justice. They asked whether the Prosecutor General is a professional officer of the law or a politician.<sup>271</sup> Finally, suspicions were raised that the Prosecution Service was inclined to make illegal bargains with suspects, such as more favorable treatment in exchange for names and incriminating facts concerning political opponents of the party the Prosecutor General is considered to favor, although plea bargaining is not permitted under Hungarian law.<sup>272</sup>

While reports on the old cases are still found in the media,<sup>273</sup> there is now a new set of cases. As a result, representatives of the media are now overtly challenging the Prosecution Service's competence and professionalism.<sup>274</sup>

The supposed political bias of the Prosecutor General has remained an issue.<sup>275</sup> It was thought that he would resign as a result of the overt lack of political trust, but this was ended by the ruling of the Constitutional Court that confirmed the Prosecution Service's independence from Parliament.<sup>276</sup> It was also thought that he would be elected a judge of the Constitutional Court so that the government could get rid of him.<sup>277</sup> But the problem seems broader. The constitutional independence of some officers of the state, including but not limited to the Prosecutor General, has led to proposals to change the Constitution.<sup>278</sup> These proposed changes have included a two-thirds majority to elect the Prosecutor General so as to enforce broader consensus among politicians and limited the Prosecutor General's independence, and a procedure to remove the Prosecutor General for professional failings. There has also been a proposal to limit the Prosecutor General's duty to Parliament to answering questions, but not interpellations, which are more likely to expose him to political attacks that

270 Ágnes Gyenis, *Forduljon ügyészéhez, Heti Világgazdaság*, October 25, 2003, at 7. It is reported that one of the suspects in a case under investigation by the police was suddenly taken to the Municipal Chief Prosecutor's office, where he was interrogated by a prosecutor. The police were informed neither previously nor subsequently of the content of the statement, and the suspect was kept in the municipal jail instead of being returned to the police. The case had serious political implications. According to press reports, the Prosecution Office's explanation of the measures was that the suspect had complained that there were insects in his cell at the police station.

271 Endre Babus, *Ügyészség kontra Rendőrség, Heti Világgazdaság*, October 25, 2003, at 6–9.

272 Krisztina Ferenczi, *Vádalkura készülhet Rejtő E. és az ügyészség, Magyar Hírlap*, November 3, 2003, at 1.

273 *Egy fantommal kevesebb, Népszabadság*, November 6, 2003, at 1; *A Schlett-ügy legvége, Heti Világgazdaság*, January 3, 2004, at 15.

274 The challenges stem in part from hostility created by a recent incident in which a journalist was prosecuted for supposedly disclosing a state secret in the course of reporting on possible corrupt practices. See Tamás Szalai & Krisztina Ferenczi, *Vádat emelt az ügyészség egyik munkatársunk ellen, Népszava*, November 6, 2004, at front page; *Kérdések az ügyészekhez, Népszava*, December 6, 2004, at 2. See also Tamás Bod, *A Legfőbb Ügyészség kormánypárti politikust perel be, Magyar Narancs*, January 27, 2005, at 16.

275 *Vázlat a legfőbb ügyész politikai szerepvállalásáról, Népszava*, June 21, 2003, at 9. See also Attila Buják, *Vége a vadászatnak, 168 óra*, March 3, 2005, at 20.

276 See *supra* note 223.

277 Endre Babus, *Ajánlat a legfőbb ügyésznek, Heti Világgazdaság*, December 14, 2002, at 107, 108.

278 *Konfliktusok a 'függetlenekkel', Világgazdaság*, July 1, 2003, at 4.

encourage politicized counterattacks. Because constitutional amendment requires a two-thirds majority, however, such change is unlikely.

Although there is no evidence to show that the media or public opinion have improperly influenced prosecutorial actions or decisions in recent years, there is a significant lack of confidence in the Public Prosecutor. Political opponents always try to involve the Public Prosecution Service in their fights.<sup>279</sup> Although controversial prosecutions have taken place, the Prosecution Service has always rejected accusations of bias, and no one has presented reliable evidence of such bias. Questionable incidents have occurred, and one may always find circumstances that may be interpreted to suggest possible bias to those inclined to believe the press; both sides of the notoriously divided Hungarian political spectrum always prefer to believe in improper influence on the part of the *other* side. However, this is not proof of prosecutorial bias—although few on either side of the political spectrum would share this view.

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## VI. Use of Statistics

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The statistics on the following pages were generated especially for this report, using data provided by József Stauber, director of the Branch on Data-Processing and Information at the Prosecutor General's office from the databases of the ERÜBS<sup>280</sup> and statistics from the Prosecutor General's office on in-court prosecutorial activity.<sup>281</sup>

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279 *Kampánybomba lehet a K&H-ügy*, *Népszabadság*, February 2, 2005, at 3. The article refers to an embezzlement case relating to the K&H Bank that implicates well-known persons, including, allegedly, politicians from both sides. No reliable information has so far appeared, but there are suggestions based on hearsay, and currently a trial in this case is under way.

280 *Egységes Rendőrségi és Ügyészségi Bűnügyi Statisztika* [Uniform Police and Prosecutorial Statistics on Crime]. See *supra* note 151.

281 These are the two systems run by the Prosecutor General's office to collect and process data on cases dealt with by the Public Prosecution Service since the 1960s. The first collects data on offenses (time, place, manner and means of commission, legal qualification of the offense, etc.), offenders (gender, age, place of residence, motives, previous record, etc.) and particulars of the proceedings prior to committal by the investigating authority (regardless of whether the investigation is conducted by the police, PIOs, Customs or Frontier Guards) and at the prosecution office (dismissal, suspension, or committal). The second deals with the particulars of in-court prosecutorial activity (motions, appeals, etc.) and court decisions.

1. Crimes known to authorities														
Year	Crimes against life, bodily integrity, health		Robbery, rape, violent sexual crime, blackmail, other crimes of violence		Property crime				Intentional traffic crime	Other criminal offenses		Total		Number of inhabitants
	number	frequ.*	number	frequ.	Serious**		Other	intentional		non-intentional	number	frequ.		
					number	frequ.								
1994	12 657	123.2	26 035	253.3	7 832	76.2	279 263	2717.4	21 843	35 329	6 492	389 451	3789.6	10 276 968
1995	12 472	121.7	25 731	251.1	10 138	98.6	380 924	3717.9	19 808	46 611	6 352	502 036	4900.0	10 245 677
1996	11 759	115.1	24 674	241.6	13 736	134.5	351 499	3441.9	16 185	42 270	5 927	466 050	4563.6	10 212 300
1997	12 413	122.0	26 987	265.2	11 586	113.9	381 417	3748.8	16 614	59 868	5 518	514 403	5055.8	10 174 442
1998	12 897	127.2	28 414	280.3	8 145	80.4	449 043	4923.8	17 552	78 497	6 073	600 621	5926.0	10 135 358
1999	12 522	124.1	28 277	280.2	7 749	76.8	350 287	3471.0	15 850	85 041	5 990	505 716	5011.2	10 091 789
2000*	12 521	124.7	29 144	290.2	9 506	94.7	302 105	3008.0	15 105	76 717	5 575	450 673	4487.3	10 043 224
2001	12 391	121.5	30 821	302.2	10 061	98.6	307 839	3017.9	15 437	84 188	4 957	465 694	4565.5	10 200 298
2002	13 209	129.8	31 214	306.8	9 193	90.4	274 471	2697.5	16 878	69 919	5 898	420 782	4135.5	10 174 853
2003	13 167	129.8	31 476	310.3	10 531	103.8	265 360	2616.4	15 712	71 656	5 441	413 343	4075.4	10 142 362

\* Frequency (frequ.)=number of offenses/100 000 inhabitants

\*\* Serious= committed “in an organized manner” (with premeditation and in cooperation with others) or where more than 2 million HUF is involved

\* Frequency (frequ.)=number of offenses/100 000 inhabitants

\*\* Serious= committed "in an organized manner" (with premeditation and in cooperation with others) or where more than 2 million HUF is involved

## 2. Offenders, identified by authorities

Year	Perpetrators of crimes against life, bodily integrity, health	Perpetrators of robbery, rape, violent sexual crime, blackmail, other crimes of violence	Perpetrators of Property Crimes		Perpetrators of intentional traffic crimes	Perpetrators of other criminal offenses		Total
			serious	other		intentional	non-intentional	
1994	8 390	21 327	1 753	56 679	19 657	6 456	5 232	<b>119 494</b>
1995	8 082	20 949	2 088	59 914	17 360	7 404	5 324	<b>121 121</b>
1996	7 509	19 431	2 579	63 513	13 511	10 671	5 012	<b>122 226</b>
1997	7 902	21 225	2 876	66 151	13 291	14 589	4 932	<b>130 966</b>
1998	7 978	22 330	2 545	68 811	13 603	19 556	5 260	<b>140 083</b>
1999	7 600	21 626	2 493	61 130	13 125	20 631	5 053	<b>131 658</b>
2000	7 309	21 514	2 850	53 744	12 255	20 475	4 713	<b>122 860</b>
2001	6 830	21 851	3 112	51 099	12 133	21 236	4 322	<b>120 583</b>
2002	7 267	23 419	3 360	47 612	13 777	21 512	4 938	<b>121 885</b>
2003	7 011	23 382	3 649	44 368	13 259	21 841	4 635	<b>118 145</b>

## 3. Comprehensive data

Year	Committed to Courts	Convicted	Acquitted
	number	number	number
1994	85 629	78 328	7 255
1995	85 867	79 406	6 461
1996	82 282	81 392	6 892
1997	89 279	82 098	7 181
1998	101 025	93 434	7 591
1999	106 161	97 753	8 408
2000	99 745	90 990	8 755
2001	105 203	97 033	6 989
2002	106 843	98 169	7 225
2003	101 458	93 699	7 759

## 4. Data on preliminary arrest and other compulsory measures

Year	Proposal by investigating authorities		Prosecutorial motion		On the motion the court				released before commitment	other compulsory measures		
	number		number	%*	ordered	rate	refused to order	rate		domestic confinement	prohibition to leave the place of res.	bail
1994	10 168	8 833	86.9		8 278	93.7	555	6.3	3 103	..	..	..
1995	9 598	8 395	87.5		7 829	93.3	566	6.7	2 731	..	53	..
1996	9 924	8 749	88.2		8 196	93.7	553	6.3	2 941	..	53	..
1997	10 235	9 055	88.5		8 521	94.1	534	5.9	2 995	..	67	..
1998	9 620	8 572	89.1		8 013	93.5	559	6.5	2 924	..	79	..
1999	9 361	8 170	87.3		7 624	93.3	546	6.7	2 659	..	85	..
2000	8 754	7 619	87.0		7 030	92.3	589	7.7	2 420	5	104	..
2001	8 634	7 681	89.0		7 129	92.8	552	7.2	2 534	13	128	..
2002	8 066	7 019	87.0		6 487	92.4	532	7.6	2 321	16	124	..
2003	7 596	6 656	87.6		6 107	91.8	549	8.2	2 011	26	111	151

%\* In rate of proposals by investigating authorities

.. No data

Source Prosecutorial review on statistics



## Appendix

### 1) Legislative Acts and Resolutions by Parliament:

- Act XX of 1949: *A Magyar Köztársaság Alkotmánya* [On Constitution of the Hungarian Republic] (as amended)
- Act III of 1952: *A polgári perrendtartásról* [On Code of Civil Procedure]
- Act IV of 1959: *A Magyar Köztársaság polgári törvénykönyve* [On Civil Code] (as amended)
- Act V of 1972: *A Magyar Köztársaság ügyészségéről* [On Public Prosecution Service of the Hungarian Republic] (as amended)
- Act IV of 1978: *A Magyar Köztársaság büntetőtörvénykönyve* [On Penal Code]
- Act XXII of 1992: *A munka törvénykönyve* [On Code on Labor Relations]
- Act XI of 1987: *A jogalkotásról* [On Legislation]
- Act LXIII of 1992: *A személyes adatok védelméről és a közérdekű adatok nyilvánosságáról* [On Protection of Personal Data and on Publicity of Data of Public Interest]
- Act XXXIV of 1994: *A Magyar Köztársaság rendőrségéről* [On Police]
- Act LXXX of 1994: *Az ügyészségi szolgálati viszonyról és az ügyészségi adatkezelésről* [On Service Relationships in the Public Prosecution Service and on Prosecutorial Data Handling]
- Act XXXII of 1997: *A határőrizetről és a Határőrségről* [On Surveillance of the State Border and the Frontier Guard]
- Act XLVI of 1997: *A Magyar Köztársaság bírósági szervezetéről és a bíróságok igazgatásáról* [On Organization and Administration of the Courts of Law]
- Act LXVII of 1997: *A bírák jogállásáról és javadalmazásáról* [On Legal Status and Remuneration of Judges]
- Act XIX of 1998: *A büntetőeljárásról* [On Criminal Procedure Code]
- Act XIX of 2004: *A Vám- és Pénzügyőrségről* [On Customs Guard]
- Act XXXVIII of 1992: *Az államháztartásról* [On Public Finance]
- Act IV of 1952: *A házasságról, a családról és a gyámságról* [On Marriage, Family, and Guardianship].
- Act II of 1989: *Az egyesülési jogról* [On Freedom to Form Associations]
- Act XLIV of 1992: *A Munkavállalói Résztulajdonosi Programról* [On Program of Employees' Partial Ownership]
- Act LV of 1993: *A magyar állampolgárságról* [On Hungarian Citizenship]
- Act LIII of 1995: *A környezet védelmének általános szabályairól* [On General Rules of Environment Protection]
- Act LXV of 1995: *Az államtitokról és a szolgálati titokról* [On State and Service Secrecy]
- Act XXXIII of 1989: *A pártok működéséről és gazdálkodásáról* [On Operation and Economization of Parties]
- Act IV of 1990: *A lelkiismereti és vallásszabadságról, valamint az egyházakról* [On Freedom of Conscience, Religion, and Churches]
- Act CXLV of 1997: *A cégnyilvánartásról, a cégnyilvánosságról és a cégbírószági eljárás-*

ról [On Registration and on Publicity of Trading Companies and on Registration Procedure at Courts]

Act LXIX of 1999: *A szabálysértésekről* [On Contraventions]

Act XLII of 1994: *A helyi önkormányzati képviselők és polgármesterek választásáról szóló 1990. évi LXIV tv. Módosításáról* [Amendment to the Constitution in Regard to Local Self-Government]

Act VII of 2006: *A Magyar Köztársaság Ügyészségéről szóló 1972. évi V. törvény és az ügyészségi szolgálati viszonyról szóló 1994. évi LXXX. törvény módosításáról* [On Modification of the Act V of 1972 on Public Prosecution Service of the Hungarian Republic and Act LXXX On Service Relationships]

Resolution of Parliament 46/1994 (IX.3§) OGY: *A Magyar Íköztársaság Országgyűlésének házszabályáról* [On the Rules of Operation of the Houses of Parliament of the Hungarian Republic]

## *2) Ministerial Ordinances:*

5/1991 (IV.4) IM, Ordinance of the Minister of Justice: *A jogi szakvizsgáról* [On Special Legal Examination]

15/1994 (VII.14) BM, Ordinance of the Minister of Interior: *A rendőrség nyomozó hatóságainak hatásköréről és illetékességéről* [On Competence and Jurisdiction of the Investigative Authorities of the Police]

23/2003 (VI.24) BM-IM, Joint Ordinance of the Minister of Interior and the Minister of Justice Agreed to by the Prosecutor General: *A belügyminiszter irányítása alá tartozó nyomozó hatóságok nyomozásának részletes szabályairól és a nyomozási cselekmények jegyzőkönyv helyett más módon való rögzítésének szabályairól* [On Detailed Regulation of Investigations and on Documentation of Acts of Investigation Otherwise than Protocols at Authorities under the Direction of the Minister of Interior]

17/2003 (VII.1) PM-IM, Joint Ordinance by the Minister of Finance and the Minister of Justice Agreed to by the Prosecutor General: *A pénzügyminiszter irányítása alá tartozó nyomozó hatóságok nyomozásának részletes szabályairól és a nyomozási cselekmények jegyzőkönyv helyett más módon való rögzítésének szabályairól* [On Detailed Regulation of Investigations and on Documentation of Acts of Investigation Otherwise than Protocols at Authorities under the Direction of the Minister of Finance]

24/2004 (IV.23) PM, Ordinance of the Minister of Finance: *A Vám- és Pénzügyőrségről szóló 2004. évi XIX. törvény végrehajtásáról* [On Execution of the Act XIX of 2004 On Customs Guard]

## *3) General Instructions by the Prosecutor General*

7/1996 (ÜK.7) LÜ, General Instruction by the Prosecutor General: *Az ügyész magánjogi tevékenységéről* [On the Civil Law Activity of the Prosecutor]

11/2003 (ÜK.7) LÜ, General Instruction by the Prosecutor General: *A vádelőkészítéssel,*

*a bűnügyi nyomozások törvényességi felügyeletével és a vádemeléssel összefüggő ügyészi feladatokról* [On Prosecutorial Tasks Connected to Preparation of Charges, Inspection of Legality of Criminal Investigations and Commitment to Courts of Law]

12/2003, (Ü.K.7) LÜ, General Instruction by the Prosecutor General: *A büntetőbíróságok előtti ügyészi tevékenységről* [On the Prosecutorial Activity in Proceedings of Criminal Courts]

25/2003 (Ü.K.12) LÜ, General Instruction by the Prosecutor General: *A Magyar Köztársaság Ügyészsége szervezetéről és működéséről* [On the Organization and Operation of the Public Prosecution Service of the Hungarian Republic]

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# Prosecutorial Accountability, Independence, and Effectiveness in Italy

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Giuseppe Di Federico

*If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get . . . In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.<sup>1</sup>*

U. S. Attorney General Robert H. Jackson, 1940

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<sup>1</sup> Robert H. Jackson, *The Federal Prosecutor*, 24 JOURNAL OF THE AMERICAN JUDICATURE SOCIETY (1940), at 19.



## **I. General Issues**

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The most distinctive, unique features of the Italian public prosecution service are the following:

1. Prosecutors and judges belong to the same corps, called the “magistracy.” That is, they are jointly recruited; they can move from one function to the other, even repeatedly; they have the same career ladder and salary; and they jointly elect a common Superior Council of the Magistracy (SCM), which decides in total independence on all matters concerning their status, from recruitment to retirement.<sup>1</sup>
2. Prosecutors enjoy the same all-encompassing guaranties of external independence as do judges. No external agency (be it Parliament, the executive or the Minister of Justice) can issue instructions to the prosecution service or supervise its activities.
3. Prosecutors, like judges, are *de facto* promoted not on the basis of an assessment of their professional performance, but by seniority of service. True, the law provides that both public prosecutors and judges be subject to recurrent professional evaluation in the course of the 40-45 years of their service. However, the interpretation given to those laws by the SCM is so lax that, *de facto*, all prosecutors (and judges) reach the highest level of career and salary (short of very grave disciplinary sanctions or criminal penalties).
4. Prosecutors, like judges, enjoy salaries and pensions considerably higher than those of other state employees; furthermore, neither the executive nor the legislative powers have any influence with regard to their salary increases, which are determined periodically on the basis of a favorable automatic mechanism (no other category of public employees enjoys such an advantage).
5. Prosecutors, like judges, can be transferred from one office to another only if they so wish (transfers for disciplinary violations or incompatibility are decided by the SCM on the basis of judicial or semi-judicial procedures).
6. Prosecutors enjoy ample guarantees of internal independence. True, they operate within offices that, formally, are hierarchically structured, but the law and regulations issued by the SCM provide quite strict limitations on the exercise of organizational or supervisory powers on the part of the heads of prosecutorial offices. Furthermore, each prosecutor can challenge before the SCM (often with success) any decision by the head of his office that he deems to be in violation of those laws and regulations or of his operational independence.

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<sup>1</sup> The term “magistrate” has different meanings in different countries. In Italy as well as in France, it is used to refer to both judges and public prosecutors, while in Spain the term is used to refer to a particular level in the career of judges. In the United Kingdom and the United States, it is used to indicate judges having specific judicial functions.

7. A public prosecutor may, even on his or her own initiative, start and conduct a criminal investigation whenever he or she believes any citizen may have committed a crime.
8. The criminal code provides that in conducting a criminal investigation, police should operate under the exclusive, binding direction of the public prosecutor in charge of the case.
9. A constitutional provision requires public prosecutors to pursue all crimes (the so-called principle of compulsory criminal action). Obviously, such an obligation is not factually attainable in any country, and the activities of prosecutors are *de facto* characterized by rather wide margins of discretion. However, the fact that the constitutional provision of compulsory criminal action is nevertheless formally binding has at least two major consequences worth mentioning at the outset of our presentation: (a) the state has the obligation to pay for all the expenses that public prosecutors deem necessary for the conduct of their investigation, without limits; any limitation would be considered a violation of the Constitution; (b) prosecutors bear no responsibility for whatever criminal investigation or initiative they undertake, even if, months or years later, their initiative turns out to be clearly unfounded. In any case, they can successfully claim that the suspicion that a crime was committed compelled them to act.

In no other country with a consolidated democracy do public prosecutors exercise such ample powers, with equal independence and less accountability. It must be added that some aspects of the prosecution service described above have been harshly criticized on the grounds that they fail to provide adequate protection of civil rights in criminal proceedings and impede the efficient functioning of the criminal justice system. Indeed, between December 2005 and April 2006, a series of laws was enacted that partially modified some features of the prosecutorial system summarized above, though at the time of this writing (mid-May 2006) it seems extremely unlikely that those reforms will ever be applied, and in any case not in their current form. In the following, I shall therefore describe the prosecution service as it has operated so far. At the end of this paper, I will briefly describe the content of those reforms and indicate the reasons that their fate is very much in doubt.

The issues of independence, accountability, and effectiveness of public prosecution in Italy cannot be dealt with in total separation from the same issues concerning judges, since they are jointly recruited, they can move from one function to another, and they share a common career path. In the following pages, after a summary description of the formal structure and activities of the prosecution offices, I shall first deal with the relationships between independence, accountability, and effectiveness that are common to both prosecutors and judges. I shall then deal with issues that more specifically concern the prosecution service. In particular, I shall address:

- the role of the SCM,
- the recruitment, professional evaluation and career of prosecutors and judges,
- salaries, pensions, and economic bonuses of prosecutors and judges,
- extra-judicial activities of prosecutors and judges and their political relevance,



- ▶ the role of the Ministry of Justice,
- ▶ the constitutional principle of “compulsory criminal action” and its operative implications,
- ▶ the relationships between prosecution offices and the regulations concerning their internal organization,
- ▶ the functional relationship between prosecutors and judges.

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## **II. Formal Structure of the Public Prosecution Service and Some Basic Features of the Role of Prosecutors in Criminal Proceedings**

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The role and activities of the public prosecution service and its members are regulated in very detailed form: in the Constitution, the Code of Criminal Procedure, the Criminal Code, the Statute of the Magistracy (*ordinamento giudiziario*), and other special laws and regulations. In the following, the norms referred to will be those most directly relevant for assessing its independence, accountability, and effectiveness.

As seen in Table 1, the structure of the prosecution service mirrors the general structure of the ordinary courts:

- ▶ one prosecution office (*Procura Generale presso la Corte di Cassazione*), functionally connected to the Supreme Court of Cassation.<sup>2</sup> It does not have any investigative function, nor does it have any supervisory function over the prosecutors’ offices at lower levels of jurisdiction.
- ▶ 26 prosecution offices (*Procure generali presso le Corti di appello*) functionally connected to 26 courts of appeal. The territorial jurisdiction of the courts of appeals is called “*distretto*.”
- ▶ 166 prosecution offices (*Procure della Repubblica*), functionally connected to an equal number of tribunals (*Tribunali*), or courts of first instance. These prosecution offices are also functionally connected to 848 courts of (very) limited criminal jurisdiction (*giudici di pace*); the territorial jurisdiction of a tribunal is called “*circondario*.”
- ▶ 29 juvenile prosecution offices (*Procure della Repubblica presso il Tribunale per i minorenni*), functionally connected to an equal number of juvenile courts.<sup>3</sup>

Both the *Procure generali presso le Corti d’appello* and the *Procure della Repubblica* vary considerably in size. The 166 *Procure della Repubblica* employ from 3 to 117

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2 The main task of the Supreme Court of Cassation is to review civil and criminal proceedings on points of law, with the aim of guaranteeing uniform interpretation of the law throughout the nation.

3 Juvenile courts handle criminal proceedings involving young people from 14 to 18 years old. Those under 14 cannot be charged for criminal offenses, regardless of their gravity.

prosecutors. All of them have a chief prosecutor (*procuratore capo*). Those employing more than 10 prosecutors have from one to nine vice prosecutors (*procuratori aggiunti*). Prosecutors who do not have supervisory positions are called substitute prosecutors, or *sostituto procuratore*. The 26 *Procure Generali presso le Corti d'Appello* employ from 4 to 24 prosecutors. All of them have a chief prosecutor (*Procuratore generale di Corte d'Appello*) and 18 of them also have one vice prosecutor general (called “*avvocato generale*”). The *Procura generale* at the Court of Cassation consists of a Prosecutor General, a Prosecutor General adjunct (*Procuratore generale aggiunto*), 5 vice prosecutors general (called “*avvocati generali*”), and 65 prosecutors. The prosecutors without supervisory function at both appellate and cassation level are called “*sostituti procuratori generali*.”

In 1991, a special prosecutorial structure was created to more efficiently coordinate the investigation and prosecution of Mafia crimes.<sup>4</sup> At the national level, it consists of a National Anti-Mafia Directorate (*Direzione nazionale Antimafia*) operating within the premises of the *Procura generale presso la Corte di Cassazione*. It is composed of a head prosecutor (*Direttore nazionale antimafia*) and 20 prosecutors (*sostitui procuratori antimafia*). There are also 26 district anti-Mafia units (*Direzioni distrettuali antimafia*) that have been created as special sections of the 26 *Procure della Repubblica*, connected to the 26 *Tribunali* located in the same cities as the 26 courts of appeal.

As of July 2005, the total number of career prosecutors assigned by law to the prosecution offices at various levels of jurisdiction was 2,408. Of those positions, 227 were vacant due to various causes, such as delays in the recruitment process or temporary service in other state agencies requested by prosecutors themselves. The law additionally provides for 1,865 honorary prosecutors who serve at the lowest levels of jurisdiction.<sup>5</sup> The number of magistrates serving as career judges is more than three times that of career prosecutors (7,053 provided for by law, with 637 vacancies).

The prosecution service has a monopoly on criminal investigation. Career prosecutors perform investigative and forensic functions at both the first level of jurisdiction and the appellate level. Honorary prosecutors do not perform investigative functions and as a rule perform forensic functions only in cases of minor criminal relevance. At the appellate level, it is relatively rare for an investigation to be repeated.

At the first level of jurisdiction, prosecutors initiate investigations following reports from the police, citizens, and private and public agencies. They can begin investigations on their own whenever they themselves deem that a crime might have been committed.<sup>6</sup> The police are bound to report “without delay” to the prosecution ser-

4 Decree-Law of Nov. 20, 1991, no.367. A Decree-Law (*decreto legge*) is a quasi-legislative act issued by the Executive that is effective for 60 days after its issuance, but expires if not approved by Parliament within that period. A Legislative Decree (*decreto legislativo*) is a form of delegated legislation in which the executive issues regulations on the basis of instructions in a *legge delega*, or law, issued by Parliament.

5 These are appointed by the SCM for a three year term, renewable only once.

6 *Codice di procedura penale* [Code of Criminal Procedure] [hereinafter Code of Criminal Procedure], Art. 330.

vice all criminal violations of which they acquire knowledge.<sup>7</sup> Special police units (*polizia giudiziaria*) are stationed near the prosecutors' offices and conduct investigations under the close supervision of the prosecutor, who also decides, case by case, on the means of investigation to be used.

The territorial jurisdiction of prosecutors in carrying out forensic activities is the same as that of the courts to which their offices are functionally connected. The scope of their territorial jurisdiction in conducting investigations, however, is unrestricted; that is, they may conduct investigations on the entire national territory and also abroad (obviously within the limits imposed by other countries). In Italy, prosecutors can freely investigate elected members of the Senate and Chamber of Deputies without prior authorization. If, however, on the basis of their findings, they deem it necessary to restrict the liberties of an elected representative (personal and house search, arrest, wiretapping etc.), parliamentary authorization is required.<sup>8</sup>

A special unit of the court of first instance, called a "judge of preliminary investigations" (*giudice per le indagini preliminari*), has the specific task of ensuring that investigations are carried out in accordance with the law, and in particular of authorizing all restrictions on personal freedoms of suspects, such as preventive detention (which may not exceed 6 years), house arrest, search, seizure, etc. The decisions of the *giudice per le indagini preliminari* to restrict a suspect's personal freedoms can be appealed both to a special panel of three judges (*tribunale del riesame*) and directly to the Supreme Court of Cassation on matters of law.

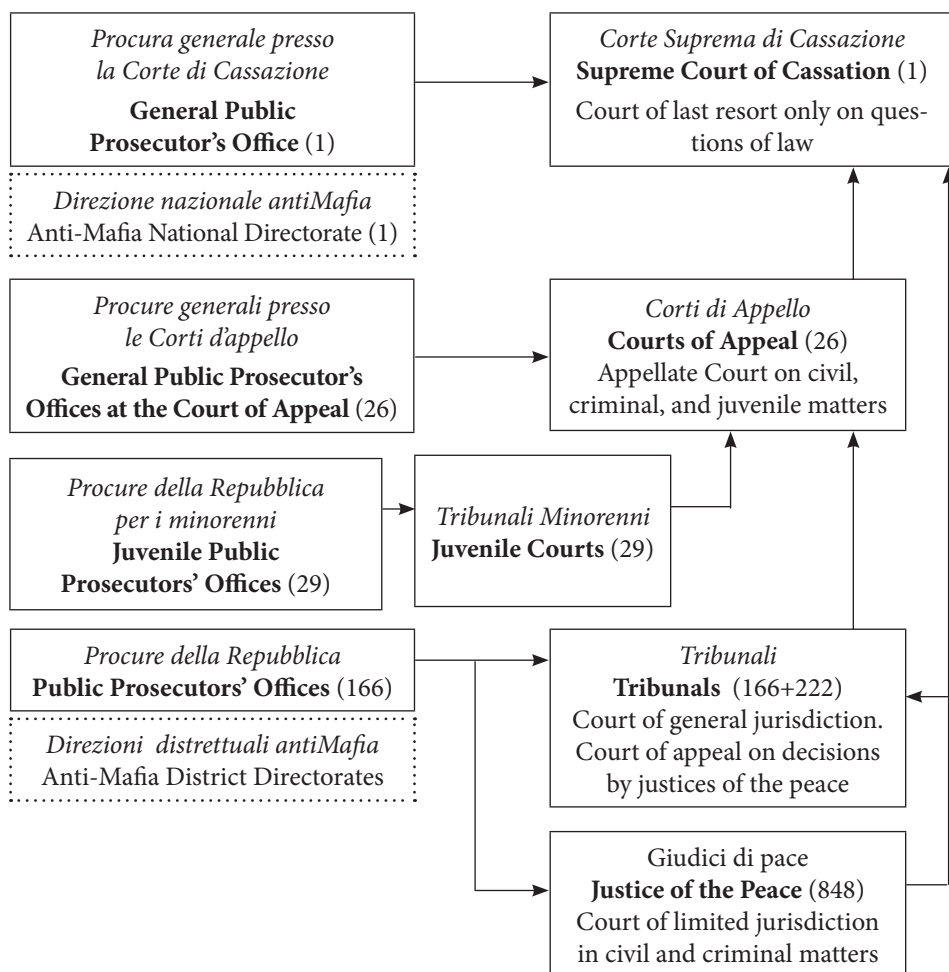
Another special unit of the courts of first instance, called a "judge of preliminary hearing" (*giudice dell'udienza preliminare*), decides on prosecutors' requests to terminate a case or have it tried by the trial court. Due to the constitutional provision of compulsory criminal action, under no circumstances can prosecutors themselves decide to terminate a case. Both at the first level of jurisdiction and at the appellate level, prosecutors can appeal judicial decisions without restriction, be they acquittal of the suspect or partial rejection of the sanctions requested by the prosecutors themselves.

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<sup>7</sup> Code of Criminal Procedure, Art. 347.

<sup>8</sup> *La Costituzione della Repubblica Italiana* [Constitution of the Italian Republic] [hereinafter Constitution], Art. 68.

Table 1



### III. The Superior Council of the Magistracy (SCM)

In order to protect judicial independence, the Italian Constitution, enacted in 1948, provides that all decisions concerning prosecutors and judges, from recruitment to retirement (recruitment, promotions, role assignment, transfers, discipline, disability, etc.), are within the exclusive competence of a Council composed primarily of magistrates (*i.e.*, judges and prosecutors) elected by their colleagues. More specifically, it provides that two thirds of the members must be magistrates and that one third of the members be elected by Parliament from among law professors and lawyers with 15 years of professional experience. It further provides that the SCM is presided over by

the President of the Republic—who rarely participates in meetings of the SCM—and includes among its members the President of the Supreme Court of Cassation and the Prosecutor General of Cassation. The elected members are renewed *in toto* every four years.<sup>9</sup> In addition to the three *ex officio* members, there are currently eight members elected by Parliament and 16 members elected by prosecutors and judges.

All decisions of the SCM are made in plenary session,<sup>10</sup> with the exception of disciplinary judgments, for which a special section of the SCM is provided (*sezione disciplinare*). This section is composed of six members of the SCM elected by the plenary session—four representatives of the magistrates and two of Parliament. Decisions by the disciplinary section are too numerous to analyze here.<sup>11</sup> Judgments on disciplinary violations for both judges and prosecutors are based on a norm worded in rather vague terms, which leaves ample room for discretion.<sup>12</sup> Disciplinary sanctions include reprimand, censure, loss of seniority up to a maximum of two years, expulsion, or dismissal.

The SCM also organizes extensive programs of initial and continuing education for prosecutors and judges, but none exclusively reserved for prosecutors.<sup>13</sup>

Since the first SCM was elected in 1959, it has progressively expanded its role far beyond the formal boundaries of judicial personnel management. This has generated recurring conflicts with the other branches of government, including the President of the Republic.<sup>14</sup> In very general terms, the SCM operates on the assumption that

9 The structure and functions of the SCM are regulated by Articles 104–107 of the Constitution.

10 Most of the decisions of the SCM on matters concerning the status of prosecutors (and judges) are taken subsequent to an advisory opinion formulated by the competent district council (*consiglio giudiziario*), i.e. the district of the court of appeals in which the prosecutor (or judge) works. There are 26 district councils, one for each court of appeals district. Each council is presided over by the president of the court of appeals and composed of the Prosecutor General of the court and eight magistrates (prosecutors and judges) elected by their colleagues serving in the prosecutor's offices and courts of the district.

11 For an illustration of the activities of the disciplinary section, see G. Di Federico, *Recruitment, Professional Evaluation, Career and Discipline of Judges and Prosecutors in Italy*, in *RECRUITMENT, PROFESSIONAL EVALUATION AND CAREER OF JUDGES AND PROSECUTORS IN EUROPE: AUSTRIA, FRANCE, GERMANY, ITALY, THE NETHERLANDS AND SPAIN* (G. Di Federico ed., 2005), RESEARCH PAPERS IRSIG-CNR, at 151–153. The full text of this book is available on the website of the Research Institute on Judicial Systems of the Italian National Research Council, at [www.irsig.cnr.it](http://www.irsig.cnr.it).

12 The norm provides that magistrates are subject to disciplinary proceedings and sanctions when they “fail to accomplish their duties and conduct themselves, either in their office or outside, in a way that makes them unworthy of the trust and consideration that a judge must enjoy, or when they jeopardize the prestige of the magistracy.” Royal Decree of May 1946, no.511, Art. 18.

13 Initial education lasts 18 months. For a description of its organization and contents, see Di Federico, *supra* note 11, at 137–38. Activities in the area of continuing education are intense. In the year 2004, for example, 49 seminars were organized lasting two or three days each. Over 4,000 magistrates participated. Sixteen seminars were open to judges and prosecutors from other countries. None of the seminars was reserved exclusively to prosecutors. It would be contrary to the policies of the SCM to formally recognize and acknowledge the existence of a difference in the professional “culture” of the two components of the magistracy.

14 For example, conflicts with the President of the Republic as president of the SCM took place in 1968 and in 1985–1986 when President Saragat and President Cossiga, respectively, tried to prevent the SCM from deciding on questions within the exclusive competence of Parliament or of the executive. In July 2005, an SCM decision to express, once again and at its own initiative, opinions and criticisms of the legislative initiatives of members of Parliament on matters pertaining to the

it is within its competence to define what judicial independence means, its operative implications, and how to protect it vis-à-vis the executive and the legislature, on the one hand, and with regard to work relations among and within the prosecutors' offices (and the courts), on the other.

The majority of SCM members are judges and prosecutors elected by their colleagues. In addition, the electoral system in use since 1968 makes the majority of the SCM extremely sensitive to magistrates' group interests and eager to follow and implement the policies advocated by the powerful trade union of magistrates (*Associazione Nazionale Magistrati Italiani*), in particular those policies agreed upon by its various factions.<sup>15</sup>

Four of the policies jointly advocated by the various factions of the magistrate's trade union since the 1960s and implemented in various ways by the majority of the SCM are relevant here. The implementation of those principles clearly emerges from a monitoring of the activities of the SCM in the last 40 years.

- (a) substantive professional evaluations for the judicial career of prosecutors (and judges) are considered, *per se*, a threat to judicial independence. Therefore, in interpreting laws regarding promotion, the SCM should use its discretionary powers to eliminate differences in its evaluations of prosecutors' (and judges') professional performances, except in cases of visible and grave violations of the prosecutor's or judge's duties.
- (b) the supervisory powers of the heads of prosecutors' offices (and presidents of courts) should be limited and closely monitored by the SCM; conversely, the operational independence of individual prosecutors should be protected and encouraged;
- (c) the SCM has the right to protect the independence and image of impartiality of prosecutors and judges by issuing public reprimands of members of the executive, Parliament or other politicians whenever their initiatives, public statements or opinions are considered, by a majority of the SCM, to be offensive to magistrates.

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administration of justice provoked a firm reaction on the part of the presidents of the Senate and the Chamber of Deputies. But the reaction had no effect: the vice president of the SCM immediately wrote an official, public letter to the president of the Senate reaffirming the right of the SCM to express opinions on and criticize any legislative initiative concerning the administration of justice, be it of the executive or of members of Parliament. The progressive broadening of the powers of the SCM is paralleled by the expansion of its staff (now over 250 people). The French SCM has a staff of only 11.

- 15 From 1959 to 1968, the higher ranks of the magistracy were greatly overrepresented and were elected only by their peers. The electoral system was changed in 1967, and since 1968 no higher ranking magistrate can be elected to the SCM without the electoral support of lower ranking magistrates. No other Superior Council of the Magistracy in continental Europe (i.e. France, Spain, Portugal, etc.) has such a predominance of members elected by the magistrates, nor an electoral law that so motivates SCM members to represent the interests of the lower ranks of the judiciary. In order to fully appreciate this aspect and its implications for the actual workings of the SCM, one must also note that the overwhelming majority of members of the SCM (at present 16 out of 27) are magistrates elected to represent one of the four factions of the magistrates' trade union. Indeed, in the last 30 years, all magistrates elected to the SCM had previously spent years as active and visible leaders both of the magistrates' trade union and of one of its factions.

- (d) the SCM has the right to express opinions, criticisms, and suggestions, not only regarding any bill introduced into Parliament by the executive or by MPs, but also regarding any amendment introduced in the course of the Parliamentary debate on those bills. \_

The consequences of (a) and (b) will be discussed below. With regard to the activities of the SCM indicated under (c), no law provides the SCM with the authority to issue such reprimands. It is not relevant here to discuss whether it is legitimate that, in a Parliamentary system, the SCM, presided over by the president of the Republic, can censure criticisms of the behavior of magistrates expressed by the Prime Minister or other members of the executive. It is, however, relevant to note that most of these reprimands were issued by the SCM in response to harsh criticisms by the Prime Minister and other ministers of criminal prosecution initiatives undertaken by public prosecutors.

Such reprimands, widely publicized in the media, serve a dual function. They both advise the public that the Prime Minister or other powerful politicians are attempting to intimidate public prosecutors and reassure public prosecutors that the SCM, the organization that determines so many aspects of their future professional status, supports their initiatives and protects their “external independence.” On some occasions, SCM solidarity with prosecutors goes beyond censures and is accompanied and reinforced by publicized visits to prosecutors’ offices by official delegations of SCM members.<sup>16</sup>

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#### **IV. Recruitment, Professional Evaluations, and Career of Prosecutors and Judges**

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##### ***A. Recruitment and promotion of prosecutors and judges***

As in other countries of continental Europe, in Italy the recruitment of career magistrates takes place on the basis of public competitive examinations opened to law graduates of “good moral standing.” This way of recruiting judges and prosecutors is considered the best way to guarantee a non-partisan selection conducive to better protection of judicial independence.

The SCM decides on the admission of candidates to the competitions and appoints the examining commissions, which are presided over by high ranking members of the judiciary and are composed, for the most part, of magistrates and some university

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<sup>16</sup> The last decision of this nature dates to February 16, 2005. The reprimand regarded a minister’s criticism of some of the criminal initiatives of the chief prosecutor of Verona. The SCM delegation thereafter went to Verona to directly convey the solidarity and support of the SCM to all prosecutors in that area.



law professors. Previous professional experience is not required, nor is it in any way evaluated in the process of selection. Applicants for the entrance examinations are selected on the basis of their general institutional knowledge of several branches of the law, as verified by written and oral exams. In Italy, this is virtually the only system of recruitment of career magistrates.<sup>17</sup> The great majority of successful candidates enter the competition between the ages of 25 and 27.

This model of selection—in Italy as well as in other continental European countries—is based on the assumption that the magistrates thus recruited will develop their professional competence and be culturally socialized within the judicial structure where they are expected to remain, and indeed usually do remain, for the rest of their working lives, ascending a career ladder whose steps are based on evaluations that take seniority and merit into account in various ways (as we shall see, in Italy this has been substantially modified). This model of recruitment and career is basically the same as that adopted for the higher ranks of national ministerial bureaucracies. For this reason, the judiciaries of continental Europe are usually called “bureaucratic judiciaries.”<sup>18</sup>

In Italy, as well as in other continental European countries, young law graduates without previous professional experience are not recruited to fill specific vacancies in specific prosecutorial offices (or courts). Rather, they are recruited from time to time to fill all vacancies that have meanwhile occurred in the entire corps of the magistracy. Only after recruitment and initial training does the SCM assign them to specific prosecutors’ offices (or courts) of first instance to fill vacancies. Thereafter, they may ask to be transferred from one court or prosecutor’s office to another and, when promoted, be assigned to fill still other vacancies at the higher levels of jurisdiction.

Recurrent evaluations of prosecutors and judges during the course of their long service is a basic organizational feature of the judicial systems of continental Europe that recruit from among law graduates with no previous professional experience.<sup>19</sup> These evaluations serve a variety of functions: first, to verify that the young magistrates have actually acquired the necessary professional competence, and thereafter to choose the most qualified among them to fill vacancies at the higher levels of jurisdiction. Last but not least, such evaluations ensure that magistrates maintain their professional qualifications throughout their many years of service (in Italy, 40–45 years) and until retirement (the compulsory retirement age in Italy was recently raised to 75).

17 The only, extremely limited, exception is the appointment for “exceptional merits” of university law professors and lawyers with 15 years of professional experience as judges of the Supreme Court of Cassation. At present, only six out of 375 judges of the Court of Cassation were appointed in this way. In France, for example, around 20 percent of career magistrates are recruited from the legal or paralegal professions. See A. Mestitz, *Selezione e formazione dei magistrati e degli avvocati in Francia* (1990), at 208–209.

18 For an illustration of the characteristics of bureaucratic judiciaries, see G. Di Federico, *The Italian Judicial Profession and Its Bureaucratic Setting*, 1 JURIDICAL REVIEW (1976), at 40.

19 See Di Federico, *supra* note 11.

Traditionally, and until the mid-1960s, in Italy seven evaluations of professional performance occurred along the career ladder, but only two were highly competitive and selective: one to become a magistrate at the appellate level, and another at the cassation level. Professional performance was evaluated by commissions composed of higher ranking magistrates on the basis of the written work of the candidates (opinions, pleadings, etc.)<sup>20</sup> The three subsequent steps on the career ladder (representing a mere 1.18% of all positions available in the entire judicial structure, see table 2, ranks 5, 6, and 7) would as a rule be acquired, short of disability or maximum age retirement, on the basis of seniority in the rank of magistrate of cassation.<sup>21</sup>

Our research data show that prior to the mid-1960s, approximately 55% of magistrates would terminate their career at the age of 70 as appellate magistrates, and that a good number of those would reach that level of career only during the very last years before retirement. During the late 1950s and early 1960s, this career system was widely criticized by a large majority of magistrates (above all by those who still had to go through the very selective competitive steps) on the grounds that professional evaluations based on written opinions and placed in the hands of a limited number of older, higher ranking magistrates (*magistrati di cassazione*) were hindering internal judicial independence and inducing, among lower ranking magistrates, a widespread conformity with the judicial interpretations of a “conservative” judicial elite that had entered the magistracy in the 1920s and 1930s during the fascist regime.<sup>22</sup>

### ***B. Promotion without evaluation***

The laws that had regulated the system of promotion until the mid-1960s were radically changed by Parliament between 1966 and 1973, under pressure from the SCM and the powerful Association of Magistrates and with the support of the leftist parties (most notably the numerous MPs from the Italian Communist Party). The new laws continued to require evaluation of professional performance for all the steps of the existing career, but left the SCM wide discretion in interpreting the law. By then the system for the election of the magistrates in the SCM had already been changed as described above, making two thirds of the Council extremely responsive to the expectations of their colleagues. The result has been that the new laws regulating the career of magistrates have been interpreted by the SCM with such extreme self-complacency as to amount to a *de facto* refusal to enforce any form of professional evaluation whatsoever. Thus promotions “for judicial merit” to the highest ranks are

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20 Di Federico, *supra* note 18.

21 In bureaucratic judiciaries, organizational roles are ordered according to a hierarchy of ranks to which differing degrees of material and psychological gratification are attached. There is a very specific relationship between the hierarchy of ranks and the jurisdictional hierarchy of courts, in the sense that judges promoted to a higher rank must be assigned to courts that are higher on the jurisdictional ladder, or else be assigned to lower jurisdictional courts and function only in a supervisory capacity (for example, as president of a lower court). This system still exists in countries of western continental Europe (like France, Spain, Portugal, Germany), but, as we shall see, has been substantially altered in Italy.

22 G. Freddi, *Tensioni e conflitto nella magistratura* (1978), at 115–147.

granted even to those magistrates who take prolonged leaves of absence to perform other activities in the executive or legislative branches of government.<sup>23</sup> While in other countries of continental Europe, heads of prosecutors' offices (and of courts) still play a crucial role in the assessment and evaluation of professional performance,<sup>24</sup> in Italy, in conformity with the policy advocated by the magistrates' trade union and by its representatives in the SCM, their role in professional evaluations has lost its original relevance.<sup>25</sup>

At present, and for the past 30 years, the evaluation of candidates with the minimum seniority requirements to compete for promotion to different levels of the judicial hierarchy is no longer based either on written or oral exams or on an evaluation of their written judicial work, but on a "global" assessment of their judicial performance, as determined by the SCM.<sup>26</sup> In the absence of serious disciplinary or criminal violations, all candidates with the required seniority are promoted. Furthermore, those promoted in excess of the existing vacancies acquire all the economic and symbolic advantages of the new rank, while remaining *pro tempore* to exercise the lower judicial functions of their previous rank.<sup>27</sup> In fact, most will never acquire the higher judicial position formally connected with their new career rank. In other words, simply by passing an entrance examination that tests his or her general knowledge of various branches of the law, the young law graduate can rest pretty much assured that the mere passage of time will lead him or her, in 28 years' time and with no further checks of professional qualifications, to reach the peak of the judicial career, which until the mid-1960s was reserved for only a little over 1 percent of magistrates. While only some 100 magistrates reached the upper level of the judicial service until the mid-1960s (and all occupied the high judicial positions formally connected to their high career rank), now there are consistently more than 1,500 (and, of course, most still exercise their judicial functions at the lower levels of the jurisdictional ladder).<sup>28</sup>

The changes introduced in the career system brought about quite a few relevant modifications in the personnel management system of the magistrates (prosecutors and judges). Below we will summarize only those that are most relevant in discussing judicial independence: that is, the greater discretion of the SCM in decisions that deeply affect the expectations of prosecutors and judges; the economic status of magistrates; and the surge in extra-judicial activities.

23 See subsection E below; see also *infra* note 33.

24 See Di Federico, *supra* note 11.

25 *Id.* at 137–142.

26 *Id.*

27 Thus one of the basic traditional characteristics of western continental judicial bureaucracies, summarized in note 21 *supra*, has been radically changed in Italy.

28 As of September 2002, for example, the percentage of middle and high ranking magistrates who exercised the judicial function formally corresponding to their career rank was relatively low, comprising only 5.5 percent (89 out of 1,560) of appellate magistrates, 1.6 percent (24 out of 1,533) of the second highest rank (*magistrati di cassazione*), and 7.9 percent (90 out of 1,137) of the highest career rank (*magistrati di cassazione con funzioni direttive superiori*).

### C. Transfer of prosecutors

One means of protecting judicial independence is forbidding transfer of judges from one office to another without their consent.<sup>29</sup> Unlike other countries, in Italy the constitutional principle of “non-transferability”<sup>30</sup> applies not only to judges, but also to prosecutors. Furthermore, in the last 30 years it has acquired a far broader scope.

As already indicated, promotion to higher rank no longer entails—and *de facto* excludes—that magistrates be assigned judicial functions different from those they exercised prior to their promotion. Indeed, they continue to exercise their previous functions. When vacancies in judicial positions correspond to their new career rank, they may apply for them, if they so wish. Thus the principle of non-transferability now covers magistrates’ entire working life, starting from their first assignment at the end of their initial training. The choice of magistrates to fill vacancies in judicial positions reserved for the higher ranks of the service is always restricted to those who voluntarily apply for them. In other words, *ex officio* assignment of judges and prosecutors to fill existing vacancies is *de facto* possible only for the first assignment of judicial roles to newly recruited magistrates. Anyone fully satisfied with his first assignment, after initial training, can remain in that position for the next 45 years, while being promoted step by step to the highest rank.

### D. Independence and the greater discretion of the SCM in decisions affecting expectations of prosecutors and judges

Detailed evaluations of professional performance, once repeatedly made during the course of an entire career, normally provide specific information on the professional and personal characteristics of magistrates that greatly restrict the use of discretion in all decisions concerning not only promotions, but also transfers and role assignment.

The *de facto* abolition of substantive professional evaluations (which are now all written in laudatory terms) has increased the discretion of the SCM in deciding on transfers and role assignments. Such decisions are, as a rule, emotionally charged for magistrates, who may compete to be assigned to a more desirable location or important office (such as the position of head of a prosecutor’s office in a larger city). Research clearly shows that, in the course of the past 30 years, Italian magistrates have realized the need to cultivate relationships with decision-makers in the SCM if they are to achieve their aspirations in such matters. A reading of records of plenary sessions of the SCM reveals the conflicts that often take place among representatives of various factions of the magistrates’ trade union in support of their voters, particularly regarding assignments to important and desirable positions.<sup>31</sup> For this reason,

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29 Constitution, Art. 107.

30 *Id.*

31 G. Di Federico, *Lottizzazioni correntizie e politicizzazione del SCM: quali rimedi*, 2 QUADERNI CO-

almost all magistrates become members of the trade union and one of its factions. The strong links between the policies of the magistrates' trade union and those of the magistrates' representatives on the SCM causes a high level of conformity among magistrates on those policies that are agreed upon by all four of its factions. The few magistrates who, in word or deed, have ignored the shared policy values of their trade union have unfailingly seen their requests and wishes disregarded by the SCM.<sup>32</sup>

### *E. Independence and extrajudicial activities*

In countries of continental Europe with "bureaucratic judiciaries," members of the judicial corps (prosecutors and judges in our case) are allowed, like other state employees, to engage in a variety of non-judicial activities on a part-time or full-time basis: in other agencies of national and local government, in European or international organizations, as elected members of national or local legislative assemblies, etc. Often the extrajudicial activities carry with them additional sources of income. The acquisition of favors and positions from agents external to the judiciary that provide financial or other benefits poses, *per se*, a problem for judicial independence and the very image of judicial impartiality.

The extrajudicial activities of prosecutors and judges increased in number, kind, and duration starting in 1970, when it became clear that the SCM would promote to the top ranks even members of the magistracy who had not performed judicial functions for decades.<sup>33</sup> Extrajudicial activities performed on a full-time or part-time basis by Italian magistrates in the last 30 years number in the tens of thousands. In recent decades, one type of activity in particular has led to a dangerous blurring of the boundaries between the judiciary and the political class: the extrajudicial engagement of members of the judiciary in active partisan politics.

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STITUZIONALI, (1990), at 69–87. The reader may wonder what role is played in the decision making processes of the SCM by the members elected by Parliament (one third of the Council). When the representatives of the four factions of the magistrates' trade union disagree, this contingent usually acts in support of one or more of those factions. Their position as decision makers is weak not only because they are a relatively small minority, but also because they often have different orientations, having been elected by Parliament on the basis of an agreement between the political majority and minority at the time of their election.

32 For an example, see Section VII below; for the literature on the subject, see note 74 *infra*.

33 Some of the promotions granted by the SCM in the early 1970s eliminated any doubt or residual restraint that the magistrates might have entertained on the matter and vividly showed them the advantages of seeking prestigious and lucrative extrajudicial appointments. Oscar Luigi Scalfaro, later president of the Republic, and Brunetto Bucciarelli Ducci were among the very few magistrates who had until then been elected to Parliament. They had been elected in 1946 and 1948 respectively as young magistrates at the beginning of their judicial careers. After that, they were always reelected as MPs. Until the early 1970s, they had not progressed in their judicial careers. In 1973, they were promoted retroactively by the SCM, step by step, to the top of the judicial hierarchy "for judicial merit," without having performed judicial functions for a single day in more than 25 years. The material and immaterial benefits that magistrates acquire by becoming members of Parliament are substantial (for example, they receive a double pension; until 1991, they also received both the salary of members of Parliament and that of magistrates).

In the elections of 1994 and 1996, over 50 magistrates asked for and obtained from the SCM a leave of absence to run as candidates for various political parties. Twenty-two of these were actually elected in 1994, and 27 in 1996. In the last 10 years, two magistrates have been elected presidents of regions; in the same period, there have been several magistrate ministers, magistrate undersecretaries of state, mayors of small and large cities, magistrates elected to regional and municipal assemblies, and magistrates in charge of various branches of local government. In the early 1990s, a member of the magistracy was elected national secretary of a political party (the *Partito Social Democratico*).

The confusion of the boundaries between the magistracy and the political class is not fully revealed merely by considering the relatively large number of magistrates active in party politics. First of all, the number of magistrates who maintain relationships with various political parties in order to obtain these much-sought after positions is far higher than those who are successful. Second, a good many extrajudicial positions of lesser importance (heads of cabinets of ministries and undersecretaries of state, high level executive posts in the various ministries, heads of the secretarial units of ministers and undersecretaries, members of the legislative departments of various ministries, and consultants to parliamentary commissions) are obtained through the more or less direct sponsorship of the various political parties. They often become—or are in any case sought after and perceived by magistrates as—steps toward the acquisition of the political credit and party support needed to attain even more desirable extrajudicial positions.

Another worrisome aspect of the relationship between judicial independence and the appointment or election of public prosecutors (and judges) to an active role in party politics is that, at the end of their mandates, prosecutors (and judges) usually return to their previous judicial activities and may even find themselves in a position to prosecute or judge politicians of a political orientation opposed to that of the political party they had previously represented.<sup>34</sup>

Why are political parties and political leaders in Italy, more so than in other countries, interested in granting members of the judiciary positions of political representation or other desirable positions that they can supply? A famous member of the judiciary, Adolfo Beria d'Argentine, twice head of the magistrates' trade union, gave one revealing answer. Commenting on the first election in which a substantial number of prosecutors and judges were elected to Parliament, he said, "The real explanation is that political parties are convinced, more or less correctly, that the magistracy is a seat of real, heavy, often brutal power . . . and that therefore it is convenient to have personalized channels of communication with it."<sup>35</sup>

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34 See, e.g., G. Di Federico, *Se il giudice è un ex onorevole del PCI*, IL RESTO DEL CARLINO, Nov. 28, 1999; G. Di Federico, *Quel giudice molto Onorato e molto PCI*, IL RESTO DEL CARLINO, Dec. 6, 1999.

35 A. Beria d'Argentine, *Perchè a tanti magiostrati non piace il 'giudice candidato*, CORRIERE DELLA SERA, Apr. 28, 1979, at 1.



### *F. Independence, salaries, pensions, and retirement bonuses*

One of the most obvious consequences of a career system in which all prosecutors (and judges) who remain in service until retirement age reach the highest career rank is that all of them also reach the highest salary level.<sup>36</sup> Through a complex combination of lawsuits, judicial decisions, and powerful pressures on Parliament, in 1984 prosecutors and judges obtained salaries, pensions, and retirement bonuses that are by far the highest in public service. Also, increases in their salaries, pensions, and substantial retirement bonuses are based on an automatic mechanism that periodically increases to their advantage the difference between their economic status and that of other sectors of the public service.<sup>37</sup>

These measures were, once again, requested, justified, and obtained as a means to further guarantee the independence of judges and prosecutors from possible, even indirect, pressures from the legislative and/or executive branches of government. The system of promotion *de facto* based on seniority of service, the privileged level of salaries, retirement benefits, and pensions, and the automatic mechanisms for future pay increases were also advocated to foster among magistrates a sense of present and future security that is thought to be a necessary prerequisite for an independent and detached exercise of the prosecutorial and judicial functions (one of the consequences is that the number of participants in the recruitment process to enter the judiciary has consistently increased in recent decades, and is by far the highest in Europe).<sup>38</sup> Table 2 provides basic data on the gross and net salaries of magistrates, listed by career rank and seniority

<sup>36</sup> With the sole exception of the four judicial positions indicated in Table 2, ranks 5 and 6.

<sup>37</sup> G. Di Federico, *Costi e implicazioni istituzionali dei recenti provvedimenti giurisdizionali e legislativi in materia di retribuzioni e pensioni dei magistrati*, in 2 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO (1985), at 331–373; F. Zannotti, *La magistratura, un gruppo di pressione istituzionale. L'autodeterminazione delle retribuzioni* (1989).

<sup>38</sup> In recent decades, the number of applicants for the entrance examination to the magistracy has increased enormously. There are usually more than 10,000 applicants (in the competition issued in 2005, this reached a peak of 41,536) and more than 5,000 of them actually show up for the written examinations (the number of positions available is, on average, around 200–300 for each competition). Our interviews with newly recruited magistrates show that the increase in the number of candidates is due in large part to the appeal of economic and career privileges. Our more recent data on this matter has not yet been published. For an analysis of the motivations of newly recruited magistrates in the 1970s and 1980s, see A. Negrini, *Origini territoriali e motivazioni di scelta della carriera*, in CARATTERISTICHE SOCIO-CULTURALI DELLA MAGISTRATURA: LE TENDENZE DEGLI ULTIMI 20 ANNI (G. Di Federico ed., 1989), at 58 (in particular Table 17).



TABLE 2

Gross and net salary by seniority of service and career rank*				
Rank	Seniority	Gross monthly salary (for 13 months**)	Net monthly salary (for 13 months**)	Net yearly salary for 13 months**)
1. <i>Uditore</i>	initial	2,695.18	1,791.61	23,290.93
	6 months	2,949.30	1,936.94	25,180.22
	18 months	3,404.27	2,208.37	28,708.81
2. <i>Magistrato di Tribunale</i>	2 years	4,153.23	2,600.24	33,803.12
	4 years	4,300.69	2,674.26	34,765.38
	5 years	5,299.43	3,206.51	41,684.63
	9 years	5,983.24	3,572.07	46,436.91
3. <i>Magistrato di Appello</i>	13 years	6,951.10	4,070.07	52,910.91
	20 years	7,679.99	4,421.69	57,481.97
4. <i>Magistrato di Cassazione</i>	21 years	8,754.85	4,963.16	64,521.08
	28 years	9,562.15	5,328.52	69,270.76
5. <i>Magistrato di Cassazione con funzioni direttive superiori</i>	29 years	10,663.94	5,860.60	76,187.80
	final	13,022.94	6,996.90	90,959.70
6. <i>Presidente Aggiunto di Cassazione; Procuratore generale di Cassazione; Presidente TSAP</i>	Initial salary	15,192.83	8,037.03	104,481.39
7. <i>Primo Presidente Corte di Cassazione</i>	Initial salary	15,318.96	8,104.10	105,353.30

\* As of 2003.

\*\* Every year, in the month of December, all public servants in Italy receive a double salary.

The level of pensions and retirement bonuses<sup>39</sup> is related not only to years of service in the judiciary, but also to a series of other factors that allow for some variation from case to case, relevant principally with respect to the amount of retirement bonuses. The actual monthly pension of those who left the judiciary at age 70 or older in 2002 was over 6,000 euros for 13 months.<sup>40</sup> In the same period, the average amount of net retirement bonuses was 330,226 euros.<sup>41</sup> In only 3 cases was the net retirement bonus slightly lower than 300,000 euros. Otherwise it was well over that amount, up to a maximum of 372,140 euros. The net retirement bonus for the 5 top positions (those indicated in Table 2, ranks 5 and 6) is well over 400,000 euros.

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## V. The Ministry of Justice and Prosecutorial Independence

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In many countries, the role of the Minister of Justice is often seen as an actual or potential threat to an independent prosecution service. One cannot entertain such suspicions with regard to Italy.<sup>42</sup>

As in other parliamentary systems, the Minister of Justice is formally in charge of promoting and implementing the policies of the executive with regard to the justice system. The Italian Constitution explicitly assigns the Minister of Justice two tasks: (a) the “organization and functioning of the services of the justice system”<sup>43</sup> and (b) the prerogative of initiating disciplinary proceedings against magistrates.<sup>44</sup> He or she also has the responsibility for recruiting most of the non-judicial personnel of the prosecutorial offices and the courts (once assigned to a prosecutors’ office or to a court, the non-judicial personnel are hierarchically subordinate only to the magistrates heading those offices). Here we shall summarize the actual powers of the Minister with reference to (a) his role in preparing and managing the budget of the justice system (b) his role in the management of the judicial corps (prosecutors and judges).

*Budgetary relationship:* For decades the Ministry of Justice, the executive and Parliament have been criticized by the magistrates because, in their view, the percentage

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39 The expression “retirement bonus” is used here to indicate the amount of money magistrates receive when they retire.

40 In December of each year, all public servants in Italy receive a double salary, be they in service or retired.

41 It was impossible to acquire all the data concerning the exit bonuses of all magistrates who retired in 2002 (the Ministry of Justice does not have such information). However, the sample we have is very large, encompassing around half of magistrates who retired in that period, and can certainly be considered representative of the whole.

42 G. Di Federico, *Independence and accountability of the judiciary in Italy: the experience of a former transitional country in a comparative perspective*, in JUDICIAL INTEGRITY (A. Sajo ed., 2004), at 198–200 (the limited powers of the Italian Minister of Justice are highlighted in a comparison with those of his French colleague).

43 Constitution, Art. 110.

44 Constitution, Art. 107.

of national financial resources earmarked for the administration of justice was insufficient to sustain the proper and efficient performance of the justice system. However, Ministers of Justice have never been seriously accused of using their budgetary powers to influence the activities of prosecutors (and judges) or to penalize criminal investigations or initiatives contrary to their political interests or that they for any reason disliked.

Since 2001, the state budget for the judiciary has progressively increased from 6.06 billion euros in 2001 to 7.72 billion euros in 2004, an increase of 27.5 percent in four years. In 2004, the allocation for the justice system was equivalent to 1.71 percent of the national budget.<sup>45</sup> The Minister of Justice does not have any financial control or power of supervision whatsoever over the expenses that prosecutors personally deem necessary for their criminal investigations (including wiretapping, expertise of any kind, travel expenses both national and international, recovery of ships or aircraft wrecks in deep sea, or anything else). The only task of the Minister of Justice is to procure the money *ex post facto* to cover those costs.<sup>46</sup>

Surprisingly, this peculiar aspect of the Italian prosecution service has not been the object of public debate or criticism. There is, it is true, repeated complaint about the very widespread use of wiretapping. This is not so much a response to its exceedingly high cost<sup>47</sup> as a reaction to the illegal, though relatively frequent, release of transcripts of its content, especially when politicians or other well known citizens are involved.

In the area of judicial personnel management, the law provides that the Minister of Justice:

(a) can participate in plenary sessions of the SCM without the right to vote (the law provides that he cannot even be present when votes on the status of prosecutors and judges take place).<sup>48</sup> He hardly ever participates in those plenary sessions;

(b) can communicate to the SCM his opinions and proposals on any deliberations included in the agenda of the plenary sessions. He does so hardly ever, if at all (for example, this was not done at all in the last three years);

(c) participates with limited powers in the decisional processes for the appointment of heads of prosecutorial offices and courts. One of the committees of the SCM (called "*commissione per il concerto*") chooses one or more names of magistrates it considers suited to those positions, and thereafter meets with the Minister to hear his

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45 For more details, see the website of the Ministry of Justice, at [www.giustizia.it/uffici/inaug\\_ag/ag-2004ministro.htm](http://www.giustizia.it/uffici/inaug_ag/ag-2004ministro.htm).

46 Since 2002, orders of payment issued by prosecutors are paid by the Post Office, which serves as a bank. The Ministry periodically reimburses the Post Office.

47 The Ministry of Justice declares that in 2005, the cost of wiretapping was 307,346,676 euros (385 million dollars). Actually the cost is far higher, as that figure does not include the cost of the personnel that operates wiretapping equipment and transcribes recorded conversations (*i.e.* police officers and clerks). Newspapers have published articles maintaining that, in absolute terms, the number of cases of wiretapping is far higher in Italy than in any other democratic country. See, e.g., *Le intercettazioni dei pm*, LIBERO, Aug. 12, 2003. We have no data to confirm that assertion.

48 Law of Mar. 24, 1958, no.195, Art. 16.

opinion. The Minister, however, does not have veto power on the names submitted to his consideration, and even without his or her agreement, the names chosen by the committee are submitted for final decision to the plenary session of the SCM;

(d) can initiate disciplinary proceeding against magistrates who, in his opinion, violate disciplinary norms. Disciplinary action can also be initiated by the Prosecutor General at the Court of Cassation, who is also in charge of all prosecutorial activities before the disciplinary section of the SCM.<sup>49</sup> Before initiating disciplinary action, the Minister of Justice can order a ministerial investigation, conducted by magistrates serving in a special ministerial unit called “*Ispettorato*.” The Minister of Justice has on occasion been accused by the magistrates’ trade union, and sometimes by the SCM, either of using ministerial investigations illegally or of initiating disciplinary proceedings against prosecutors in an attempt to intimidate them. In some cases, prosecutors have even been successful in impeding inspections ordered by the Minister to determine whether a disciplinary violation had been committed.<sup>50</sup>

The Minister of Justice, like other ministers, depends for his initiatives and activities on his ministerial staff. One cannot fully appreciate the constraints under which the Minister of Justice operates without taking into account the fact that all high level executive positions in the Ministry of Justice and almost all intermediate and low level posts are occupied by magistrates.<sup>51</sup> Furthermore, there is a widespread conviction among magistrates that all executive positions in the Ministry must remain in their hands as a guarantee that the Minister of Justice will not take initiatives detrimental to judicial and prosecutorial independence.<sup>52</sup> Even when assigned by the SCM to serve at the Ministry of Justice, magistrates remain under the full authority of the SCM in matters of discipline, promotions, and future destinations or role assignments as magistrates. As a consequence, in conducting their activities at the Ministry, they are much more concerned with fulfilling the expectations of—or at least not entering into conflict with—their professional trade union and their colleagues who have been elected members of the SCM, than with the expectations of the Minister himself. The SCM has repeatedly shown its determination to disregard the requests or aspirations of those very few magistrates who have not conformed to its expectations while serving at the Ministry of Justice.<sup>53</sup>

49 Law of Mar. 24, 1958, no.195, Art. 4.

50 The last case with which I am familiar happened in 2003. A member of Parliament who was tried before a panel of judges of the Milan Tribunal requested that the documents collected during a proceeding against “unknown persons” eight years previously be made available to his lawyers, as he believed information in the documents would be useful for his defense. The prosecutors in charge of the case refused to reveal the contents of the investigation dossier. Because the law also provides that investigations should not last more than two years, the Minister of Justice ordered a review. The Milan prosecutor’s office successfully refused to reveal the content of the dossier, on the grounds that it would prejudice the investigation in that case. The SCM sided with the prosecutors and passed a resolution to censure the Minister. See G. Di Federico, *Il pubblico poliziotto*, IL GIORNALE, July 28, 2003, at 1.

51 As of July 2005, the number of magistrates serving in the Ministry of Justice was 81.

52 See G. Di Federico & M. Sapignoli, *Processo penale e diritti della difesa: la testimonianza di 1000 avvocati penalisti* (2002), at 30–33 (in note 53 at page 33 there is a quotation from an official document from the magistrates’ trade union in which the presence of magistrates in all key positions in the Ministry of Justice is justified as a means to protect judicial independence with regard to ministerial initiatives that might endanger it).

53 *Id.* at 34–35. For an example, see Section VII below; for literature on the subject, see note 74 *infra*.

## **VI. The Constitutional Principle of Compulsory Criminal Action and its Implications at the Operative Level**

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So far, we have analyzed many of the aspects of the Italian judicial system that characterize the relationship between independence and accountability for prosecutors and judges alike. Now we turn to those that more specifically concern the prosecution service and individual prosecutors.

It is impossible to understand the rationale behind the organization of the prosecution service, the relationships among the various prosecution offices, and the relationships between the chiefs of the prosecution offices and individual prosecutors without first understanding the reasons for the adoption of the principle of “compulsory criminal action,” its interpretations, and the ideology behind those interpretations.

The attempt to balance the values of independence and accountability is a subject of debate in many countries.<sup>54</sup> From a formal point of view, the “solution” adopted in Italy seems ideal. In preparing the text of the Italian Constitution after World War II, the founding fathers devoted a great deal of attention to public prosecution. To avoid the possibility that the powers of public prosecution might be used in a politically discriminatory fashion, as in the previous fascist period, they felt it necessary to sever the traditional tie that had until then linked public prosecutors hierarchically to the Ministry of Justice.

The Constitutional Assembly decided that prosecutors should have a monopoly over initiating criminal proceedings, and at the same time “have at [their] disposal” a judicial police.<sup>55</sup> It specifically wanted such a monopoly to be exercised in full independence, without any of the direct or indirect forms of political accountability existing in other constitutional democracies.

Somewhat naively, to avoid discretionary or arbitrary, and therefore politicized, use of prosecutorial powers, it decided that it would be sufficient to prescribe mandatory criminal prosecution for all criminal violations.<sup>56</sup> None of the authors of the Constitution seems to have doubted that such a provision could be *de facto* observed, or that all offenses could be equally prosecuted. They also firmly believed that independence and mandatory prosecution, two sides of the same coin, would be the safest guarantee of the constitutional precept that all citizens are equal before the law.<sup>57</sup>

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54 On the relationship between independence and accountability, see G. Di Federico, *Prosecutorial Independence and the Democratic Requirement of Accountability: Analysis of a Deviant Case in a Comparative Perspective*, 38 BRITISH JOURNAL OF CRIMINOLOGY (1988), at 371; G. Di Federico, *The Independence and Accountability of the Public Prosecutor: In Search of a Difficult Equilibrium*, 9 MEDITERRANEAN JOURNAL OF HUMAN RIGHTS (2005), at 114–118.

55 Constitution, Art. 109.

56 Constitution, Art. 112.

57 All proposals to establish avenues of accountability within the democratic process for the activities

The traditional organizational model of the public prosecution service in Italy was the same as in France. The Minister of Justice was at the apex of the hierarchical pyramid of the entire network of prosecution offices (with the exception only of the Prosecutor General's office at the Court of Cassation).<sup>58</sup> The hierarchical line of command ran from the Ministry of Justice to the 23 prosecutors general at the courts of appeal, to the more that 150 chiefs of the prosecutors' offices at the level of the tribunals located in their districts.<sup>59</sup> The chiefs of the prosecutors' offices at the tribunal level exercised supervisory powers over the prosecutorial activities of the over 800 *Preture* located in the "*circondario*," that is, in the area of their territorial jurisdiction (the *preture* were courts of limited jurisdiction manned by career magistrates; they were abolished in 1998<sup>60</sup>).

The prosecutors general at the courts of appeals had ample discretionary powers in distributing, withdrawing, and reassigning cases among the prosecutors in their offices. They could furthermore take over cases from any of the prosecutors' offices at the tribunal level operating in their district; on those cases, they or one of their "subordinates" (given the telling name of *sostituti procuratori*)<sup>61</sup> could investigate and perform all the necessary forensic activities.<sup>62</sup> Likewise, the chief of the prosecution office at the tribunal level could, at his discretion, distribute, withdraw, and reassign cases to his subordinates.

With the elimination of the hierarchical powers of the Minister of Justice over the prosecution service after the Second World War, any form of coordination among prosecutors' offices at the national level also vanished. However, the hierarchical

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of public prosecutors were voted down. The Constitutional Assembly not only rejected a proposal to keep public prosecution under the supervision of a Minister of Justice responsible to Parliament, but also rejected the proposal to establish a Prosecutor General appointed by Parliament. The requirement of compulsory criminal action was deemed a sufficient guarantee against possible prosecutorial abuses in the exercise of their powers of investigation and criminal initiative (for a summary presentation of the decisions of the Constitutional Assembly on these issues, see Francesco Rigano, *Costituzione e Potere Giudiziario* (1982), at 131–157. See also *Commentario della Costituzione, Tomo IV, La Magistratura* (G. Branca ed., 1987, at 39–85). The need to preserve total prosecutorial independence and mandatory criminal initiative are so rooted in the Italian legal and political culture that they survive even against empirical evidence of their dysfunction. While it is now widely acknowledged that prosecutors do exercise unaccountably broad discretionary powers with great political relevance, the majority of the Parliamentary Commission now in charge of revising the Italian Constitution has chosen to reconfirm both the principles of prosecutorial independence and compulsory criminal action. Various explanations have been offered to account for this curious decision. They cannot be adequately presented here for at least two reasons: first of all, because they are complex and would require a separate paper; second of all because, I humbly admit, I myself have serious difficulty understanding them in full.

58 Due to the fact that the Prosecutor General at the Court of Cassation did not have (and does not now have) any powers in the area of criminal investigation and criminal action.

59 Precise numbers are not indicated because, in the period under consideration, the number of those offices increased.

60 Legislative Decree of Feb. 19, 1998, no.51.

61 The same formal definition of "*sostituti*" (substitutes) to denote ordinary prosecutors was originally and symbolically meant to explicitly indicate that the powers of the prosecutor's offices at all levels of jurisdiction were concentrated in the hands of the chief, and that the "substitutes" for all their activities, were operating in his name with only delegated powers that could be withdrawn at any time.

62 Code of Criminal Procedure, Art. 53.

powers of the prosecutors general at the courts of appeals and of the chief prosecutors at the tribunals remained untouched and substantially operative until the early 1960s. Such powers began to be effectively contested by the majority of the magistrates after the creation of the SCM, and more markedly after 1968 and in the 1970s and 1980s. During those years, substantive changes were introduced, largely without modification of existing laws.<sup>63</sup>

The basic ideas behind those changes—ideas largely shared by the magistrates' trade union and by its representatives in the SCM—can be summarized as follows:

- (a) any exercise of discretionary powers by the heads of offices conflicted with the constitutional principle of compulsory criminal action, and was therefore also a potential breach of the related principle of the equality of all citizens before the law. This included any directives on priorities to follow, how to deal with specific cases, the investigative means to employ, or whether to restrict a suspect's personal liberties;
- (b) the protection of the internal independence of each prosecutor therefore should not be different from that of a judge;
- (c) the constitutional norm providing that the specific judge should be "predetermined by law"<sup>64</sup> should also apply to prosecutors. Internal regulations concerning case distribution should guarantee that, when a new case is filed, the existing rules, and not the chief of the office, automatically determine the prosecutor in charge of the case, and no one should have the discretionary power to take it away from him;
- (d) coordination of investigative activities conducted by prosecutors operating in different areas of the country should take place on the basis of voluntary collaboration among prosecutors in charge of related cases, not through hierarchical channels;
- (e) it was the task of the SCM, conceived of as the "organizational apex of the magistracy," to implement these ideas through its policies in the area of judicial personnel management.

It would go beyond the scope of this report to delineate the means through which those policies were implemented and describe visible episodes in the process of change. Before the end of the 1980s, however, these policies had produced most of the desired effects, and they were formally recognized and legitimized by a series of laws passed between 1988 and 1998. These laws form the backdrop to our discussion of relations among prosecutors' offices, the regulations on their internal organization, and some of their implications for the relationship between the independence, accountability, and effectiveness of public prosecution.

63 It would be beyond the scope of this chapter to describe here the changes that took place during those years in the traditional relationships among and inside prosecutors' offices, the role played by the magistrates' trade union and its representatives in the SCM in determining those changes, and the means through which changes were introduced without modification of existing laws. For information on this see G. Di Federico, *Obbligatorietà dell'azione penale, coordinamento delle attività del pubblico ministero e loro corrispondenza alle aspettative della comunità*, in *ACCUSA PENALE E RUOLO DEL PUBBLICO MINISTERO* (A. Gaito ed., 1991), at 185–194.

64 Constitution, Art. 25.



## VII. Relations Among the Prosecution Offices

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The Code of Criminal Procedure which came into effect in 1989,<sup>65</sup> and the modifications to the Statute of the Magistracy (*ordinamento giudiziario*) connected with it, drastically restrict and closely regulate the power of the prosecutors general at the courts of appeals to take over (*avocare*) single cases or specific investigations from the prosecutors' offices operating in their districts.<sup>66</sup> The law provides that whenever the prosecutor general decides to take over a case or an investigation, he must justify his initiative and communicate notice of his decision and justifications to the Superior Council of the Magistracy.<sup>67</sup> The aforementioned laws do not grant any hierarchical power to the prosecutors general at the courts of appeals to coordinate investigations or other activities carried out by the prosecution offices operating in their judicial districts.

More generally, the Code of Criminal Procedure enacted in 1989 does not provide any authoritative instrument for the coordination of investigative activities of the various prosecutors' offices, either within or across districts. It explicitly provides that such coordination should take place on a voluntary basis.<sup>68</sup> The content of the norms that drastically limit the powers of the prosecutors general at the courts of appeal is basically a legitimization *a posteriori* of developments that *de facto* had already taken place in the preceding years. It is interesting to note that the two ministerial commissions delegated to actually write those norms were composed in good part of magistrates who were militant members of the magistrates' trade union.<sup>69</sup>

The strong opposition to any form of hierarchical supervision of the activities of prosecutors, as well as the efficacy of the magistrates' union and of the SCM in opposing such measures, was again evident on the occasion of the creation of the National Anti-Mafia Directorate. The unit was created in 1991 to meet the functional need of coordinating, on a national level, investigations of Mafia crimes on a national and international level. The first version of the legislative decree<sup>70</sup> assigned the director of that office (a magistrate, to be appointed by the SCM) substantive hierarchical powers with regard to the activities of prosecutors at the local level, in the sense that he could issue binding instructions, take over cases from local prosecutor's offices, and directly conduct the necessary investigative activities.

The reactions of the best-known magistrates in the prosecution offices, the magistrates' trade union, and the SCM was fierce and raged relentlessly for weeks, un-

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65 The Code was approved by Parliament in 1988 but only became effective the following year.

66 Code of Criminal Procedure, Art. 372, 412.

67 *Ordinamento giudiziario* [Statute of the Magistracy], Royal Decree of Jan. 30, 1941, Art. 70.

68 Code of Criminal Procedure, Art. 371.

69 Di Federico, *supra* note 63, at 176–177 (see in particular note 6).

70 Decree-Law of Nov. 20, 1991, no.367.

til the Minister of Justice agreed to eliminate from the legislative decree any trace of hierarchical supervision over the activities of local prosecutors.<sup>71</sup> Here again, the view prevailed that in order to protect the independence of prosecutors, spontaneous collaborations are the only legitimate means to promote the necessary coordination among prosecutors' offices.

The powers assigned to the National Anti-Mafia Director are an illustration of that view. He has the right to be informed of all investigative activities in the area of Mafia crimes and can temporarily send one or more of the 20 prosecutors from his office to collaborate with investigations conducted by one or more of the 26 District Anti-Mafia Directorates;<sup>72</sup> he can issue instructions to the 26 District Directorates in order to avoid investigative conflicts and promote more effective ways to coordinate their joint investigative activities; if such instructions are not followed and conflicts arise nevertheless, the National Anti-Mafia Prosecutor can summon local prosecutors involved to a meeting, in order to resolve the conflicts among them with their participation. If such a meeting is ineffective, he can take over the case and conduct the investigation directly under only two circumstances, which amount to illegal conduct by local prosecutors: prolonged and unjustified investigative inactivity, or unjustified continuous violation of the norm providing for voluntary collaboration. This has not happened in the last 14 years, that is, since the creation of the National Anti-Mafia Directorate. Should such an event occur, the law provides, on the one hand, that the National Anti-Mafia Director's decision can be opposed before the Prosecutor General at the Court of Cassation, and on the other, that he must communicate his decision and its justifications to the SCM.

The events connected with the creation of the National Anti-Mafia Directorate illustrate the role that the SCM plays in using its decisional powers to induce conformity to the ideological tenets of the magistrates' trade union on matters regarding the judiciary and its organization. Such episodes also further illustrate the magistrates' trade union's expectations that magistrates temporarily serving in executive positions at the Ministry of Justice should operate to prevent the Minister from undermining judicial and prosecutorial independence, as defined by the magistrates' association.

The magistrate temporarily serving at the Ministry of Justice who inspired and wrote the first version of the legislative decree concerning the creation of the National Anti-Mafia Directorate, on behalf of the Minister, was Giovanni Falcone. Falcone was internationally famed for the efficacy and success with which, over many years of service as a magistrate in Palermo, he had conducted numerous investigations on Mafia crimes at the national and transnational levels. After having collaborated with the Minister of Justice on the decree, he was accused by the magistrates' trade union and its representatives in the SCM of trying to undermine prosecutorial independence and sacrificing his own independence.<sup>73</sup> These accusations were more

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71 The Decree-Law of Nov. 20, 1991 in the revised version was then approved by Parliament (Law of Jan. 20, 1992, no.8).

72 For a brief presentation of the National and District Anti-Mafia Directorates, see Section II above.

73 See, e.g., an article published in the official newspaper of the Communist Party by a member of the SCM at the time: A. Pizzorusso, *Falcone superprocuratore? Non può farlo, vi dico perchè*, L'UNITÀ, Mar. 12, 1992, at 3.

than mere words; they also had punitive implications. Falcone applied for the post of National Anti-Mafia Director. Though he was by far the most qualified candidate for the job, he was outvoted in the SCM commission for the appointment of heads of judicial offices. This was a clear and visible admonition to any magistrate who might follow in his footsteps and deviate from the expectations of the SCM.<sup>74</sup> The recommendation of the commission that outvoted Falcone in favor of another candidate was never confirmed by the plenary session of the SCM, as Falcone was assassinated by the Mafia on May 23, 2002.

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## VIII. The Internal Organization of the Prosecution Offices and the Independence of Each Prosecutor

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Three closely related aspects of the evolution of the prosecutorial function in Italy must be taken into account in order to comprehend the role of chief prosecutors and the level of operative independence of each prosecutor in the exercise of his investigative and forensic functions. These are (a) the regulations concerning the internal organization of the offices of prosecution; (b) the powers granted to prosecutors for the exercise of their investigative and forensic functions; (c) the implications of the fact that the principle of compulsory criminal action is not *de facto* attainable and that, as a consequence, the investigative and forensic functions of prosecutors are, to a greater or lesser extent, discretionary in nature.

It is important to keep in mind that what will be said with regard to criminal initiative and criminal investigations concerns primarily the offices of prosecution at the lower levels of jurisdiction, as investigative activities at the level of the courts of appeals are relatively infrequent.

*Supervisory powers of office heads:* During the 1970s and 1980s, the tenet that the Superior Council of the Magistracy should act as the “organizational apex of the magistracy” had taken root and the SCM progressively succeeded in regulating the internal relations of the prosecutors’ offices (as well as those of the courts). A law enacted in 1998 officially empowers the SCM to elaborate, approve, and enact the norms that regulate the internal organization of the prosecution offices.<sup>75</sup> The body of norms elaborated by the SCM for the internal organization of prosecutors’ offices and courts looks very much like a code (composed of 115 norms, most of them set out in numerous and lengthy sections).

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<sup>74</sup> To describe in detail all the examples that could be cited in support of this statement would be beyond the scope of this chapter. For a more complete description of other occasions in which Falcone experienced discrimination by the SCM and the reason behind that discrimination, see F. La Licata, *Storia di Giovanni Falcone* (1993), at 121–128, 189–221. For other examples, see: Corrado Carnevale, *Un giudice solo* (2006); A. Mestitz, *Selezione e formazione professionale dei magistrati e avvocati in Francia* (1990), at XXII note 11.

<sup>75</sup> Legislative Decree of Feb. 19, 1998, no.51, Art. 6.

One of the main aims of this elaborate body of norms is to reduce as much as possible the discretionary powers of the heads the prosecutors' offices (a) by establishing strict criteria on the basis of which the offices should be organized and the work load distributed and (b) by providing an effective procedure to insure compliance with those norms.

Every two years, the head of each prosecution office must prepare a detailed organizational plan in which, among other things, he must specify the division of work among the members of the office, the criteria with which incoming cases will be assigned to each prosecutor, and who will do this prosecutor's work in case of his absence. If, in the course of the two years, one or more organizational positions should become vacant, the chief of the office cannot fill those positions at his discretion. He must hold a formal internal competition among the members of the office and then choose among the applicants according to the rules issued by the SCM.

The chief of the office must communicate all the aforementioned decisions, as well as any deviation from the organizational plan during the two-year period, to the competent district council (*consiglio giudiziario distrettuale*), which is presided over by the president of the district court of appeals and composed of a majority of magistrates elected by their colleagues in the district.<sup>76</sup> He must also communicate criticisms (if any) of his decisions by members of his office. The district council must express its opinion on the plan and the criticisms of the individual prosecutors. These documents are then sent to the SCM, which analyzes them and decides whether the decisions of the head prosecutors are in conformity with the regulations. If they are not, the chief prosecutor is invited to modify his decisions. When conflicts arise, informal contact and pressures frequently occur between the prosecutors and their colleagues who are elected members of the district councils and of the SCM.

This shows the extent to which the SCM has worked to guarantee the functional independence of individual prosecutors for all activities, investigative and forensic, related to the cases of which they are in charge. The main supervisory powers over the day-to-day activities of his office formally remaining in the hands of the chief prosecutor are those of summoning periodic office meetings and asking individual prosecutors to inform him of the investigative activities related to cases he considers particularly important. He can deviate from the regulations concerning case distribution, but he must justify these decisions and have them reviewed by the local district council and the SCM.<sup>77</sup> In other words, cases assigned to a substitute prosecutor tend to become very much like personal property.

The Code of Criminal Procedure enacted in 1989 recognized and further defined powers that to a large extent had characterized the role of the prosecutor for at least a decade. The most relevant are: (a) the prosecutor may initiate criminal investigations not only at the request of other agents (police, other public authorities, citizens, etc.), but also on his own initiative, whenever he believes that a crime has been commit-

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<sup>76</sup> There are 26 *consigli giudiziari*, one for each court of appeals district. See *supra* note 10.

<sup>77</sup> I was a member of the commission of the SCM dealing with the internal organization of all the prosecutors' offices for three years, and not a single case of this sort was ever brought to our attention.

ted;<sup>78</sup> (b) he has full control of the police, in the sense that he is personally in charge of directing investigative activities,<sup>79</sup> and can decide what means of investigation to use (without budgetary limitations).<sup>80</sup> In the course of the investigative phase, he *de facto* becomes an independent police officer. If his cases acquire public visibility, as often happens, his statements on the case are publicized, his picture is printed in the main newspapers, and he appears on television to announce investigative successes, surrounded by (silent) members of the police forces operating under his direction. He is also totally independent in his forensic activities.<sup>81</sup> He can decide to appeal decisions of the trial judge if the latter does not accept his requests, and he can also decide on his own to “follow his cases” to the higher level of jurisdiction, by acting as prosecutor at the appellate level as well.<sup>82</sup> This broad prosecutorial independence with regard to cases assigned to them is often referred to as “personalization of prosecutorial functions” (*personalizzazione delle funzioni del pubblico ministero*).

In assessing the independence of individual prosecutors, the other peculiar aspects of the Italian judicial organization indicated above must be kept in mind, in particular: (a) that, *de facto*, their career is not based on substantive evaluation of professional performance, but on seniority; (b) that their salaries are increased periodically on the basis of a favorable mechanism; (c) that they cannot be transferred to another office unless they themselves so wish.

*Compulsory action and de facto discretion:* In this and in the two previous paragraphs, we have dealt with the organizational characteristics of the prosecution service that favor prosecutorial independence. To fully understand the predominance of independence over accountability, it is necessary to take into account that, on the one hand, the entire structure of the public prosecution service is built on and around the idea that the constitutional principle of compulsory criminal action is factually attainable and, therefore, better pursued if prosecutors can operate unfettered by hierarchical constrictions. On the other hand, however, penal action in Italy is just as discretionary as in other countries, and perhaps more so, due to the phenomenon of the “personalization of prosecutorial functions” described above. No constitutional provision can change the hard fact that in Italy, as elsewhere, the sheer magnitude of criminal activity precludes the possibility of prosecuting all criminal offenses, let alone prosecuting them with equal attention and effectiveness. As a consequence, this *de facto* discretion permeates prosecutorial decision making across all activities that prosecutors perform (priority in pursuing cases on the docket, amount and nature of investigative resources to employ in each case, restriction of personal freedoms or property rights).<sup>83</sup>

78 Code of Criminal Procedure, Art. 330.

79 Code of Criminal Procedure, Art. 347.

80 See Section V above.

81 Code of Criminal Procedure, Art. 53.

82 Code of Criminal Procedure, Art. 570.

83 G. Di Federico, *supra* note 63; M. Fabri, *Discrezionalità e modalità di azione del pubblico ministero nel procedimento penale*, IX POLIS no.2 (1997), at 171–192.

Quite a few important, and negative, consequences are caused by the combination of the broad powers assigned to prosecutors, on the one hand, and the constitutional principle of compulsory criminal action, which is not factually viable but is at the same time legally binding, on the other. It has become quite legitimate for a willing prosecutor to start and carry out, with the utmost independence, investigations of any kind, on any citizens, using the various police forces to verify whether the offenses he assumes have actually been committed. He cannot be held accountable for these decisions in any way, even if such accusations turn out to be totally unfounded at the trial stage, after having caused irreversible and often devastating consequences to the lives of the suspects. He can, in any case, successfully claim that, due to the constitutional imperative of compulsory criminal action, he could not have done otherwise, because he was convinced that a crime had been committed.

*Prosecutorial definition of criminal justice policy:* Furthermore, prosecutorial use of non-transparent, unregulated, discretionary power in the areas of investigation and penal initiative has *de facto* placed in the hands of prosecutors the day to day definition of a substantial portion of the country's criminal justice policy. That is, criminal justice policy is now in the hands of a bureaucratic corps that bears no political responsibility for it.<sup>84</sup> This has opened the door to more ample use of prosecutorial discretion than in countries where the discretionary powers of prosecutors are exposed and restricted. Where priorities are openly regulated through decisions taken within the democratic process, prosecutors are rendered accountable for their actions. This is not the case in Italy.

Under such conditions, it should come as no surprise that the independence accorded individual prosecutors has led to use of their *de facto* discretionary powers in ways that differ substantially depending on their personal ambitions. This phenomenon, often highlighted by the press in the last 20 years, emerges very clearly from interviews with members of the magistracy and even from occasional official statements by well-known prosecutors, who have criticized the total absence of a binding judicial policy.<sup>85</sup>

Giovanni Falcone, Italy's famed prosecutor of transnational organized crime mentioned above, commented:

*How can it be conceivable that, in a liberal democratic regime, we do not yet have a judicial policy, and everything is left to the absolutely irresponsible decisions of the various prosecutors' offices, and often even to the personal decisions of their members? In the absence of institutional controls on the activities of public pros-*

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84 In January 2007 the President of the French Republic, Jacques Chirac, appointed a reform commission on the justice system (*Commission de réflexion sur la justice*). Due to recurrent criticism of the negative influence of politics on proper functioning of the prosecution service, the President specifically asked the Commission to consider the possibility of adopting the principle of compulsory criminal action, as in Italy, and eliminating the Minister of Justice's hierarchical powers over the prosecution service. On this point, the Commission noted that it is *de facto* impossible to pursue all criminal offenses. As a consequence, all discretionary choices in the area were part of the nation's criminal justice policies and therefore had to be maintained as the political responsibility of the executive.

85 Paradoxically, the interconnected constitutional provisions of prosecutorial independence and mandatory criminal action in many ways impede the very achievement of the ultimate value, the equal treatment of all citizens under law, that the authors of the constitution wanted to protect.



*ecutors, the peril exists that informal influences and hidden connections with hidden loci of power might influence their activities. It seems to me that the time has come to rationalize and coordinate the activities of public prosecutors rendered de facto unaccountable by a fetishist conception of the principle of mandatory criminal initiative.*<sup>86</sup>

He also argued that

*Judicial policies cannot be left in the hands of the head of the [prosecutors'] offices, or worse, in the hands of each member of the various offices, without any institutional control. Such a system does not favor the effectiveness of the judicial function in terms of a real, coordinated, generalized repression of criminal phenomena, nor is it conducive to the equal protection of the citizens under the law . . . nor does it favor the image of justice, which . . . [thus] appears to public opinion as a variable of the system that has gone completely wild.*<sup>87</sup>

The relevance of the “fragmentation” of prosecutorial powers and its many negative implications is further confirmed by the answers to a series of questions asked in three different periods (1992, 1995, and 2000) of a sample of 1,000 defense lawyers with regard to their personal experience in criminal proceedings. On average, 70 percent declared that there are substantial differences in the way individual prosecutors define priorities in the exercise of their functions. Around 55 percent of the lawyers also said that there are substantial differences in the ways individual prosecutors decide “in very similar cases” regarding the nature and extent of the means at their disposal during the investigative phase.<sup>88</sup>

Lawyers maintain that the vast amount of unregulated discretionary power exercised by prosecutors restricts the role of the defense and renders the protection of their clients’ civil rights during the lengthy phase preceding the public trial far more dependent on the good will of prosecutors than on their own professional capacity as lawyers. Furthermore, lawyers indicate that prosecutorial independence in fact covers up decisions actually motivated by personal ambition or political orientation, or else by a desire for fame and the gratifications that go with it.<sup>89</sup> In particular, lawyers claim that prosecutors often use prolonged preventive detention as a way to obtain confessions corresponding to the investigative objectives they are pursuing or confirming their working hypotheses (91.5 percent of the lawyers maintain that preventive detention was actually used for devious reasons).<sup>90</sup> Such accusations are widely shared, have recurrently been the subject of heated debates in the media and the political arena, and have found receptive ears even in the *Bureau de la Federation In-*

86 G. Falcone, *Interventi e Proposte (1982-92)* (1994), at 173–174 (emphasis added). Similar views are expressed by another well known prosecutor, see Carlo Nordio, *Giustizia* (1997).

87 Falcone, *supra* note 86, at 180–181.

88 Di Federico & Sapignoli, *supra* note 52, at 17, 107–112. Regarding the lawyers’ responses here and below, it is in my view unthinkable that a large majority of three samples of 1,000 criminal lawyers interviewed in three different years would indicate the existence of phenomena that do not exist or are only marginal.

89 *Id.*

90 *Id.*



*ternationale des Droits de l'Homme*.<sup>91</sup> Lawyers have repeatedly organized demonstrations and even prolonged strikes to protest the progressive erosion of their defensive role, to no avail.

The level of discretion that characterizes Italian prosecutors' actions in criminal proceedings and the coercive measures at their disposal have progressively led them to acquire, *de facto*, the control and definition of a consistent share of public policy in the criminal sector, and with it also the ever more visible role of "problem solvers" for a considerable number of current political, social, and economic issues over the last 30 years or so, including workplace safety, environmental pollution, tax evasion, bank fraud and similar economic crimes, terrorism, organized crime, and corruption among public officials and politicians. Their successful initiatives in the area of political corruption have caused substantial changes in the political leadership and party structure of the country,<sup>92</sup> and have also consistently occupied the front pages of our national newspapers and television news programs.

The preceding discussion is still not sufficient to fully illustrate the overwhelming prevalence of independence over accountability in the actual workings of the Italian judicial system. Several concrete examples follow.

- In 1992 the chief of the prosecutor's office in Palmi, in southern Italy, decided on his own initiative to investigate the relationship between the Freemasons and organized crime. In 1994 he extended his investigations to members of a new political party called *Forza Italia*. Under his direction, the police conducted investigations covering the entire country. So much material was collected that the Ministry of Justice rented a warehouse in which to store it and hired computer specialists to retrieve it. The media followed the investigations with great interest due to the importance of the people actually or potentially involved. The chief prosecutor of Palmi acquired national fame and was praised for his independence in conducting investigations without regard to the position of the suspects. He was promoted to chief of the largest prosecutor's office in Italy, in Naples. On February 25, 2001, the case was finally brought before a judge in Rome. The judge closed the case, saying that no indications could be found in the monumental documentation that a single crime had been committed. He also stated that no indications could be found even to justify the investigation. No questions were raised about the vast resources wasted without cause. After all, a specific article of the Code of Criminal Procedure allows a prosecutor to initiate an investigation to ascertain whether a crime has been committed.<sup>93</sup> Furthermore, any limitations on his powers to investigate would have been contrary to the principle of compulsory criminal action. The more than 60 people

91 *La Missione della F.I.D.H.*, LE NUOVE LIBERTÀ, Nov.-Dec. 1992, at 3–6. The writings on the matter (newspaper and magazine articles, books) are numerous. See, e.g., L. Mantovani, *The Italian Guillotine, Operation Clean Hands and the Overthrow of Italy's First Republic* (1998); N. Colajanni, *Mani Pulite? Giustizia e politica in Italia* (1999); G. Gargani, *In nome dei pubblici Ministeri* (1998).

92 In the years 1992–1994 the most prominent leaders of the five political parties that had composed the governing majority in the preceding 30 years were investigated for corruption and related crimes. All five parties disappeared from the political scene in the elections held in 1994.

93 Code of Criminal Procedure, Art. 330.

investigated for more than eight years did not even receive formal apologies.<sup>94</sup>

- **Public prosecutors are required by law to seek evidence in favor of, as well as against, a suspect.**<sup>95</sup> In fact, prosecutors hardly ever do so on their own initiative. In telephone interviews with a sample of almost 3,000 criminal lawyers, more than 13 percent said that prosecutors sometimes go so far as to hide evidence in favor of the suspect.<sup>96</sup> Initially, I believed such responses were a sign of frustration at the very limited role played by criminal lawyers in investigations. Later, while analyzing disciplinary proceedings for 1998, I found a case in which a prosecutor had not revealed to the appellate judge crucial exculpatory evidence regarding a suspect held in preventive detention. As a consequence, the innocent suspect remained in jail and was not released until eight months later. In the disciplinary proceeding that followed, the facts of the case were undisputed, yet the prosecutor received no disciplinary sanction.<sup>97</sup>
- **Two prosecutors at the prosecution office in Rome were convinced that a female witness knew that a suspect had fired the gun that had killed a student at the University of Rome.** On June 11, 1997, they interrogated the witness in their office. She was accompanied by her brother-in-law, a police officer. The interrogation was videotaped by a hidden camera.<sup>98</sup> The prosecutors left the room after having accused the witness of refusing to identify the suspect. They intended to videotape what she would say once she was alone with her brother-in-law, whom she trusted and who could advise her with the authority of a law officer. The brother-in-law pressed her to reveal what she knew to the prosecutor, but she insisted, in emotional fashion, that she knew nothing. The videotape then showed one of the prosecutors returning and harshly questioning the witness as she cried and repeated that she knew nothing. The prosecutor then advised her that if she did not “tell the truth” she might end up being accused of having had a part in the homicide, and even said “you will most certainly be sentenced for homicide.”<sup>99</sup> Three days later, she confessed to having seen the suspect fire the gun. The entire videotape accidentally became public and was broadcast on television, and some magazines even circulated the cassettes. The impact on public opinion was great; the press, political leaders, and the Prime Minister expressed their concern. Criticism was even voiced at a public meeting of the SCM. Yet the two prosecutors who had conducted the investigation were not censured. During the public trial of the homicide of the student, the Rome Tribunal decided not to take the content of the videotape into account and gave full credit to the testimony of the witness, who, on the witness stand, confirmed having seen the suspect fire the gun.

94 This case is described in Delfo Del Bino, *Il caso massoneria, un decennio di politica, giustizia e democrazia* (2001).

95 Code of Criminal Procedure, Art. 358.

96 See Di Federico & Sapignoli, *supra* note 52, at 16, 102 (Table 4.3).

97 See the decision of the disciplinary section of the SCM of Jan. 23, 1998, no.9/98 and the decision of the Court of Cassation (*Sezioni Unite*) of May 4, 1999, no. 282.

98 The transcript of the interrogation is published in A. Beretta Anguissola & A. Figà Talamanca, *La prenderemo per omicida. Caso Marta Russo: il dramma di Gabriella Alletto* (2001), at 73–225.

99 *Id.* at 210. It would be difficult here to give even a summary of the crudeness of the interrogation, in which the prosecutor suggested that she might receive a sentence of 24 years and comments such as “think of your children” were addressed to the witness.

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## IX. Relationship Between Prosecutors and Judges

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As we have already said, judges and prosecutors are recruited through the same public competition soon after graduation from university. They can initially be assigned to serve either as prosecutors or judges and thereafter can switch, even repeatedly, from one function to another. They follow the same career path, receive the same salary, and belong to the same trade union. They jointly elect their representatives to the self-governing body of the magistracy. In sum, through a very effective, prolonged process of socialization, they develop a strong sense of common destiny. In addition, judges and prosecutors have their offices in the same buildings and have daily informal contacts.

Such close ties render those temporarily playing the part of judges particularly sensitive to the expectations of their colleagues temporarily playing the role of prosecutors, mainly during the investigation phase, when decisions must be made by the judge on prosecutors' requests concerning, among other things, restrictions on privacy and the suspects' personal freedom. Field research confirms the existence of informal *ex parte* communications between prosecutors and judges with reference to decisions the latter must make on matters concerning measures to be adopted during the investigative phase.

There is also documentary evidence not only on the inclination of judges to satisfy the expectations of their "colleagues" acting as prosecutors during the investigative phase, but also to the effect that this phenomenon is not *de facto* considered a violation of judicial ethics, as it is in other countries.<sup>100</sup> Due to the informal nature of such phenomena, it is not possible to specify its frequency and distribution on the basis of direct observation and official documents. Two factors, however, clearly suggest that it is frequent and widespread. One is the exceptional frequency with which judges decide in conformity with prosecutors' requests, both during the investigative phase (including requests concerning the limitation of suspects' personal liberty, such as preventive detention) and at the end of this phase, when they must decide whether to terminate the case or send it to a full public trial. The second is the fact that the overwhelming majority of our three samples of 1,000 defense lawyers indicated that informal *ex parte* communications on the substance of the cases at hand do take place between prosecutors and judges, excluding the defense, on a daily basis. They further indicated that judges' decisions during and at the end of the investigative phase consist, with rare exceptions, of passive, almost rubber stamp acceptance of the requests formulated by their colleagues-prosecutors.<sup>101</sup> A clear-cut division be-

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100 G. Di Federico, *Il pubblico ministero. indipendenza, responsabilità, carriera separata*, in XXIX L'INDICE PENALE no.2 (1995), at 399–437 (in particular pages 421–422 and note 30). See also Di Federico & Sapignoli, *supra* note 52, at 122–124 (in particular note 49 and Table 4.19).

101 Di Federico & Sapignoli, *supra* note 524, at 122–124 (in particular Table 4.19). It is possible that the

tween judges and prosecutors is among the primary requests of the association of criminal lawyers.

The following illustrates the grave anomalies that may occur in a judicial system where judges and prosecutors are colleagues belonging to the same corps. In 1984, a panel of judges of the Tribunal of Milan, going against the prosecutor's request, released a detainee in preventive custody after an appeal. The prosecutor then telephoned the judge who had presided over the panel and harshly reproached her "with violent verbal aggression" for having disregarded his request to keep the detainee in prison. The judge reported the incident to the president of the tribunal, who called a meeting with both the prosecutor and the judge to discuss the matter, without taking sides. A few weeks later, the presiding judge of the panel had another "case of identical nature" to that which had given rise to the conflict, with the participation of the same prosecutor. She wrote to the president of the tribunal asking to be replaced by another judge because, due to the earlier experience, she feared that "the same distasteful situation may arise again" and therefore felt "deprived of the serenity which is necessary to adjudicate." The president of the tribunal accepted her request and appointed another presiding judge.<sup>102</sup> No disciplinary action was taken against the prosecutor or the president of the tribunal.

The participants in this illustration seemed far more interested in maintaining peace "in the family" and good relations among colleagues than in protecting judicial in-

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answers given by these defense lawyers might exaggerate the dimensions of such phenomena. Of course, no one can provide a reliable measure of such events, because they take place at an informal level and hardly ever come to the surface. However, other sources indicate that they do occur and are widespread: (a) quite a few disciplinary proceedings take place either concerning actual "collaborations" between prosecutors and judges in preliminary investigations or showing that prosecutors expected a collaborative attitude on the part of their "colleague" judges (see, for example, the following sentences from the disciplinary section of the SCM: no.066-1992 (93); no.015-1993; no. 031-1996; no. 036-1996; no. 081-1998; no.034-2000); (b) in a public debate that took place in Naples in 1996, the director of the office of the judges of preliminary investigations in that city openly admitted that the rate of judges' acceptance of prosecutors' requests had sharply diminished in the period in which he and all the judges in his office had been temporarily transferred to a building some distance from that of the prosecutors; (c) various forms of passive acceptance by judges of prosecutors' requests during and at the end of the investigative phase were clearly indicated by magistrates in the interviews I conducted in 1991-1993, when I was in charge of a large research project financed by the Ministry of Justice on the application of the (then) new Code of Criminal Procedure. In some cases, the judges of preliminary investigations even justified their passive acceptance of prosecutors' requests by pointing out that, in organized crime cases, requests for preventive detention often concerned numerous suspects and that the documentation supporting those requests was so ponderous that it could not be analyzed within the term of 48 hours imposed by the law. Rather than releasing suspects who might be dangerous or could damage the delicate and time consuming investigative work of the prosecutors, they therefore thought it was better to accept the request for preventive detention; after all, the suspects could appeal their decision within a short period of time before a panel of judges (the so called "*giudice del riesame*").

102 The entire story is described in the hand-written letter with which the judge asked the president of the tribunal to be replaced (the description of the case, as well as the quotations, are taken from that letter). The letter was accidentally found by the lawyer in the second case, who published it, adding that in the second case, the prisoner remained in prison, as desired by the prosecutor. A. Viviani, *La degenerazione del processo penale in Italia* (1988), at 78-80, 177-178 (the text of the letter is reprinted at pages 177-178; the case is described and commented upon at pages 78-80). The book presents several other examples similar to those described above.

dependence and the rights of citizens. The episode came to the attention of the SCM twice. The first time was on the occasion of the prosecutor's professional evaluation for promotion to the second highest career rank. The episode was considered irrelevant, and he was promoted.<sup>103</sup> The incident was reviewed a second time when he asked to be appointed deputy chief of one of the three largest prosecutors' offices in the country: he was appointed nevertheless.<sup>104</sup>

The types of examples presented above have usually surfaced by mere accident. While no firm conclusions can be drawn about the extent of such behavior, it is clearly *de facto* considered legitimate, since when such cases emerge, the prosecutors involved are not in any way sanctioned or penalized. The very wide margins of independence that each prosecutor enjoys in the conduct of the investigative and forensic activities of the cases on his docket allow for great and multifaceted variations from prosecutor to prosecutor, and even from case to case. As a researcher who for many years has had the opportunity to be a "participant observer" in the actual functioning of the Italian judicial machinery,<sup>105</sup> I could offer, for example, many instances in which prosecutors conduct investigations directly, like police officers, as well as many others in which prosecutors not only completely delegate the investigative phase to the police, but even go so far as to say that it is degrading for a magistrate to get involved in investigations and "act as a policemen." I could also indicate cases in which the head prosecutor exercises substantial supervisory authority over the activities of the prosecutors in his office (with their tacit consent).

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## **X. Effectiveness of the Prosecution Service: Statistics**

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Much of what has been said so far deals with the relationship between independence and accountability, and shows how the value of independence (both external and internal) is in many ways overriding. In the prosecution service, as in any other organization, a very low level of concern for and protection of the value of accountability is associated with a very low level of effectiveness (leaving aside other intervening variables). Yet no efforts are made in Italy to collect reliable analytical data on the effectiveness of the prosecution service and of individual prosecutors. No such data is collected in the processes of professional career evaluation. Other countries evaluate the effectiveness of the prosecution service based on the ratio of success of prosecutors in court and their efficiency in using investigative resources as against the results obtained.

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103 Transcript of the SCM session of Jan. 10, 1996 (4 PM).

104 Transcript of the SCM session of Dec. 19, 2002.

105 In forty years of research on judicial systems, I have often been in charge of consulting or operative functions in the Italian judicial system. My experience includes responsibility for the research and work flow management office of the SCM (1968–1970); work as a consultant to various ministers and undersecretaries of justice; memberships of various commissions of inquiry created by the Ministry of Justice and the President of the Republic (as president of the SCM); and membership in the SCM (2002–2006). In the years 1991–1993 I directed, on behalf of the Minister of Justice, the team that monitored application of the new Code of Criminal Procedure.

In Italy, the very use of such data to evaluate the effectiveness of individual prosecutors and prosecution offices would be considered a menace to the independence of prosecutors in the application of the constitutional principle of compulsory criminal action.

A partial, limited official indication of the low level of effectiveness of our prosecution service in the area of criminal investigation can be found in the yearly reports on the administration of justice issued by the Prosecutor General at the Court of Cassation every January upon inauguration of the judicial year. Year after year, these reports indicate that a very high percentage of the perpetrators of crimes remain unidentified and unpunished. Some 95 percent of the thefts, around 80 percent of robberies, and around 50 percent of homicides are unsolved—more generally, some 80 percent of all reported crimes.<sup>106</sup> And these figures may be low estimates, according to the Prosecutor General himself.

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## **XI. Current Reforms**

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Between December 5, 2005 and April 5, 2006, laws were enacted that modify some of the most controversial features of the prosecution service described so far. Some of those laws, however, included provisions that delayed their actual application to a later date.

The opposition parties of the time strongly opposed those reforms and promised to change them if they came to power in the upcoming election. In fact, on April 10, 2006, they did win the election and are currently debating what to do about these reforms. At the time of this writing (mid-May 2006) it is therefore impossible to forecast the fate of the reforms—whether they will be abolished altogether or partially implemented with substantial changes. All we can do here is indicate how these reforms would modify both the status of prosecutors and judges and some of the most controversial features of the Italian prosecution service. Regarding the latter, the main modifications would be:

- (a) as of 5 years after recruitment, magistrates would no longer be allowed to move from the role of prosecutor to that of judge and vice versa;<sup>107</sup>
- (b) chief prosecutors would have the power to issue regulations binding on prosecutors in their offices in carrying out their investigative activities;<sup>108</sup>
- (c) all prosecutorial initiatives involving limitations on personal liberties or property rights of suspects would require authorization by the chief prosecutor or his representative;<sup>109</sup>

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106 The full text of the yearly reports of the Prosecutor General at the Court of Cassation are available on the web site of the Italian Ministry of Justice, at [www.giustizia.it](http://www.giustizia.it).

107 Legislative Decree of Apr. 5, 2006, no.160.

108 Legislative Decree of Feb. 20, 2006, no.106.

109 *Id.*



- (d) the chief prosecutor, or his representative, would be the only magistrate entitled to provide the media with information on the activities of his office;<sup>110</sup>
- (e) when a citizen is acquitted at the first level of jurisdiction, prosecutors would no longer be able to challenge that verdict before the appellate court. However, the number of circumstances under which a prosecutor could challenge a sentence of acquittal directly before the Supreme Court of Cassation would increase.<sup>111</sup>

Promotions of prosecutors (and judges) to higher levels of jurisdiction would no longer exceed the number of existing vacancies and would be based on competitive evaluations (written and/or oral and/or relative to the actual activities of the candidates). Those choosing to compete for positions at higher levels of jurisdiction would be allowed to enter the competition with lower seniority than presently required. If successful, they would therefore attain higher salary levels sooner than at present, and also sooner than their colleagues who do not compete. Magistrates choosing not to participate in competitions for promotion to higher ranks would remain at the lower levels of jurisdiction, but would nevertheless attain the same salary increases available at present, based on the same summary and ineffectual professional evaluations illustrated above. In other words, all magistrates would continue to reach the top of the salary and pension ladder, and would receive the same exit bonuses described above.<sup>112</sup>

As regards the disciplinary system for prosecutors (and judges), the major innovation proposed in the law is the introduction of a relatively detailed list of disciplinary violations and sanctions connected to them.<sup>113</sup> Furthermore, the law introduces the principle of compulsory disciplinary action.

Most of the reform bills indicated above were introduced in Parliament by the former Minister of Justice in March 2002. Many changes were introduced in the course of the long parliamentary debate, due to various highly effective sources of resistance to the innovations originally proposed. The powerful Italian magistrates' trade union has conducted a very active and vocal campaign of opposition to the bill; the magistrates twice went on strike against the pending reforms. Harsh criticisms of the reforms proposed in the bills have also been expressed in the official opinions that a majority of the SCM has prepared for the Minister of Justice. This comes as no surprise, as the majority of members of the SCM are elected from among the most active members of the trade union of magistrates. The militant aggressiveness of the magistrates' trade union against the reforms and the government that proposed them can also be better understood if we consider that, without exception, all reforms passed by Parliament in the past 40 years on the Statute of the Magistracy were always introduced in response to specific requests by the magistrates' trade union, or with its consent.

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110 *Id.*

111 *Id.*

112 Legislative Decree of Apr. 5, 2006, no.160.

113 Legislative Decree of Feb. 23, 2006, no.109.



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## XII. Closing Remarks

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The role and the functions of the public prosecutor have often been the subject of debate and reform in many democratic countries. International bodies such as the United Nations Congresses on the Prevention of Crime, the Council of Europe, and the European Union have issued numerous recommendations on this topic. This interest is certainly justified, for at least two reasons:

(a) because of the crucial role public prosecution plays in the repression of crime. Public prosecutors are the “gate keepers” of criminal justice, since without their initiative, there cannot be judicial punishment. Furthermore, their role has acquired an ever-growing importance due to the increase in the magnitude and complexity of criminal phenomena experienced at the national and international level by all countries in recent decades;

(b) because of the devastating consequences that undue, improper, or partisan use of criminal initiative may entail for the protection of civil rights and for safeguarding the social, economic, familial, and political status of citizens and equal protection before the criminal law. As we know, criminal initiative often is, *de facto*, a sanction in itself, rarely remediated by a judicial acquittal that follows years later.

The Italian case illustrates the negative consequences of a system in which the unrealistic principle of compulsory criminal action prevails. In such a system, a good part of the actual day to day definition of public policy in the criminal sector rests *de facto* in the hands of a bureaucratic corps that applies police powers and criminal initiatives with complete independence, and with a discretion for which they can in no way be held accountable. The absence of any regulation of discretionary powers in the exercise of criminal enforcement leads, of necessity, to very varied use of the powers of investigation and criminal initiative on the part of individual prosecutors’ offices and prosecutors. Paradoxically, this severely undermines the very protection of the principle of the equality of the citizen before the criminal law that compulsory criminal action and independent public prosecutors were together supposed to guarantee, according to the authors of the Constitution. This goes hand in hand with all the negative consequences that derive from this system for the protection of civil rights during criminal proceedings, the correct and efficient use of material and human resources, and the efficient repression of the more complex forms of criminality, which often requires close coordination of the activities of the various public prosecutors’ offices.

I would like to close with a thought about the use of the concept of independence. I believe that using it interchangeably with reference both to judges and to public prosecutors generates some confusion and misunderstanding, which, though particularly evident in the Italian case, are present also in the debate about judicial systems in

other civil law countries. From the functional point of view, the term “independence” has, and cannot but have, different meanings when referring to the status of the judge and to that of the public prosecutor. That is, the objectives, and also the guarantees, of independence in democratic countries are, as a rule, different for judges and prosecutors. To engage in a thorough comparative discussion of the differences and the negative consequences that occur when those differences are not taken into account goes beyond the scope of this presentation. Here I shall simply point out that the independence of the judge is a necessary, though not sufficient, condition to guarantee some of the fundamental characteristics of his specific role—that is to say, that of a passive agent who impartially judges controversies submitted to him by others, after having heard the contending parties on an equal footing. It is therefore necessary to create the best conditions to ensure that he is free from influences from within and/or outside the judiciary. In a democracy, the very legitimacy of his role depends not only on his being, but also on his appearing, independent and impartial.

The functional characteristics of the role of public prosecutors are very different. Far from being passive and *super partes*, their role is by its very nature essentially active. It is the prosecutor's duty to promote enforcement of criminal law, and in many countries, including Italy, to direct investigations by the police. As a party to the proceedings, he cannot be impartial, nor does the legitimacy of his role depend on appearing to be so. The difference between the roles of judges and public prosecutors is visible even when considering them from the perspective of internal independence: in order to be effective, the activity of the public prosecutor often requires hierarchical coordination of his activities with other members of his office or with the activities of other prosecutors' offices, while for judges, similar hierarchical coordination of their activities and their decisions would represent a clear violation of their independence.

Also of great relevance are the differences with regard to external independence. The intrinsically discretionary nature of criminal action makes the definition of the priorities to be followed in its exercise an integral and relevant part of the choices that must be made for the effective repression of criminal phenomena. Due to their great political relevance, such choices are as a rule defined, at least in general terms, in the context of the democratic process, and are binding on public prosecutors. Therefore, the external independence of public prosecution is not necessarily compromised by instructions received from the outside (as would be the case for judges). The external independence of the public prosecutor consists, rather, in not receiving instructions of a specific nature related to specific cases, in a non-transparent way.



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# Report on the South African National Prosecuting Authority

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Anton du Plessis  
Jean Redpath  
Martin Schönteich



## I. Background

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South Africa's transition to democracy in 1994 was achieved by means of a negotiated settlement involving the government at the time, the African National Congress (ANC), as well as various other political forces.

The "Interim Constitution,"<sup>1</sup> a key result of these negotiations,<sup>2</sup> provided *inter alia* for electoral rules that the country's first democratic election was to be conducted in April 1994. The Interim Constitution also contained a number of Constitutional Principles on which the "Final" Constitution was to be based.<sup>3</sup>

Key among the principles, for the purposes of this report, is that the Final Constitution must be the "supreme law" binding on all organs of state and all levels of government.<sup>4</sup> There must be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness, and openness.<sup>5</sup> The judiciary must be appropriately qualified, independent, and impartial and have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.<sup>6</sup>

The Interim Constitution also provided for an amnesty application process for politically-motivated crimes committed during the Apartheid era.<sup>7</sup> This led to the passing of legislation providing for the Truth and Reconciliation Commission (TRC) process.<sup>8</sup>

South Africa thus entered into a process of institution building and constitutionalism after 1994. Grand reconstruction plans focused on remodeling services, legislative reform, and institutional transformation and development. During this period, state institutions, including criminal justice departments, had to perform under difficult conditions while simultaneously transforming to meet the needs of the new constitutional state. New laws and policies aimed at building a new South Africa based on a culture of human rights, democracy, and non-racialism were promulgated. In 1998 alone, 132 pieces of legislation were considered by Parliament.<sup>9</sup>

The Final Constitution dramatically improved the legislative framework for accountability, providing that all executive organs of state must be accountable to Parlia-

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1 Constitution of the Republic of South Africa Act 200 of 1993, assented to 25 January 1994, commenced 27 April 1994.

2 The negotiations commenced in December 1991.

3 Constitution of the Republic of South Africa Act 200 of 1993, Schedule 4.

4 Constitutional Principle IV, Schedule 4, Constitution of the Republic of South Africa Act 200 of 1993.

5 Constitutional Principle VI, Schedule 4, Constitution of the Republic of South Africa Act 200 of 1993.

6 Constitutional Principle VII, Schedule 4, Constitution of the Republic of South Africa Act 200 of 1993.

7 (No Section) Chapter 15, Constitution of the Republic of South Africa Act 200 of 1993.

8 Promotion of National Unity and Reconciliation Act 34 of 1995.

9 J. Redpath, "Government on the March," *Fast Facts* (South African Institute of Race Relations), November 1998, at 2.

ment.<sup>10</sup> Parliamentary portfolio committees were established to give effect to this oversight function. Parliament and its committees have the power to summon any person to appear before them, give evidence, or produce documents, and they may receive petitions, representations or submissions from the public.<sup>11</sup> In addition to Parliamentary oversight, the Constitution established a range of independent oversight institutions (known as Chapter 9 institutions), including the Auditor General, the Public Protector, and the South African Human Rights Commission.<sup>12</sup>

South Africa's legal system is based on a combination of Roman-Dutch law and English common law which must be interpreted in light of the Constitution. Most of South Africa's substantive legal principles are based on Roman-Dutch law, while the majority of procedural and evidentiary laws are based on English common law.

### South Africa's prosecution service

During much of the twentieth century, there was no formal or substantive separation of powers between South Africa's most senior prosecutors—the provincial attorneys-general—and the executive, and direct or indirect political influence on the prosecution process was possible.<sup>13</sup> However, in 1992, the authority to institute prosecutions became the sole responsibility of the attorneys-general and their delegates, free of ministerial interference, *via* a legislative amendment that removed the power of the Minister of Justice to interfere with the attorney-generals' decisions.<sup>14</sup> The function of the Minister of Justice in relation to attorneys-general was reduced to that of a co-coordinator, ensuring that the reports of the attorneys-general were submitted to Parliament. At most, the Minister could ask an attorney-general to furnish him with reports and provide explanations regarding the handling of particular cases.<sup>15</sup>

The amendment was at the time viewed with some cynicism, promulgated as it was by the old government barely two years before a new government, with new Ministers, was to come into being. The legislative amendment provided that an attorney-general held office until age 65 and could not be removed except for misconduct, ill-health, or incapacity.<sup>16</sup> The ANC regarded the legislation as "an attempt by the old-order prosecutors to protect their entrenched positions."<sup>17</sup>

10 Constitution of the Republic of South Africa Act 108 of 1996, section 55(2).

11 Constitution of the Republic of South Africa Act 108 of 1996, section 56.

12 Constitution of the Republic of South Africa Act 108 of 1996, chapter 9 (the whole).

13 For example, section 3(5) of the Criminal Procedure Act 51 of 1977 allowed the Minister of Justice to reverse any decision arrived at by an attorney-general: "An attorney-general shall exercise his authority and perform his functions under this Act or under any other law subject to the control and directions of the Minister, who may reverse any decision arrived at by an attorney-general and may himself in general or in any specific matter exercise any part of such authority and perform any of such functions."

14 Section 8 of the Attorney General Act 92 of 1992 repealed section 3(5) of the Criminal Procedure Act 51 of 1977.

15 Attorney General Act 92 of 1992, section 5 and 6.

16 Attorney General Act 92 of 1992, section 4(1)(a) & (2)(a).

17 D. Van Zyl Smit & E. Steyn., "Prosecuting authority in the new South Africa," (unpublished paper prepared for workshop of experts on the review of criminal justice in Northern Ireland, Belfast), 9



The new Parliament of 1994, termed the Constitutional Assembly for the purposes of passing the final Constitution, introduced a constitutional provision dealing specifically with a prosecuting authority for the country.<sup>18</sup> This provision provides, *inter alia*, that:

- ▶ A single national prosecuting authority, structured according to an Act of Parliament, shall have the power to institute criminal proceedings on behalf of the state.<sup>19</sup>
- ▶ National legislation must ensure that the prosecuting authority exercises its functions without fear, favor, or prejudice.<sup>20</sup>
- ▶ The President shall appoint a National Director of Public Prosecutions who is head of the prosecuting authority.<sup>21</sup>
- ▶ The National Director determines, with the concurrence of the Minister of Justice and after consultation with the Directors of Public Prosecutions, general policy to be observed in the prosecution process.<sup>22</sup>
- ▶ The National Director must issue policy directives to be observed in the prosecution process,<sup>23</sup> and the National Director may intervene in the prosecution process when policy directives are not complied with.<sup>24</sup>
- ▶ The National Director may review a decision to prosecute or not prosecute, after consulting the relevant Directors of Public Prosecutions.<sup>25</sup>
- ▶ The Minister of Justice must exercise final responsibility over the prosecuting authority.<sup>26</sup>

One of the attorneys-general at the time objected to the inclusion of this provision in the constitutional text during the Constitutional certification process.<sup>27</sup> The grounds raised were that the provision impinged on the separation of powers between the legislature, executive, and judiciary and interfered with appropriate checks and balances.

The Constitutional Court rejected the objection, arguing that the prosecuting authority is not part of the judiciary, and that the appointment of the National Director of Public Prosecutions by the President does not in itself contravene the doctrine of separation of powers.<sup>28</sup> Moreover, the court noted that the constitutional provision requiring that subsequent legislation had to ensure the prosecuting authority exercise its functions without fear, favor, or prejudice was in fact a guarantee of prosecu-

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June 1999, at 5.

18 Constitution of the Republic of South Africa Act 108 of 1996, section 179(1)-(5).

19 Constitution of the Republic of South Africa Act 108 of 1996, section 179(1) read with section 179(2).

20 Constitution of the Republic of South Africa Act 108 of 1996, section 179(4).

21 Constitution of the Republic of South Africa Act 108 of 1996, section 179(1)(a).

22 Constitution of the Republic of South Africa Act 108 of 1996, section 179(5)(a).

23 Constitution of the Republic of South Africa Act 108 of 1996, section 179(5)(b).

24 Constitution of the Republic of South Africa Act 108 of 1996, section 179(5)(c).

25 Constitution of the Republic of South Africa Act 108 of 1996, section 179(5)(d).

26 Constitution of the Republic of South Africa Act 108 of 1996 section 179(6).

27 *Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC). Summary of objections and submissions, Annexure 3.

28 *See Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC), at para. 141.

torial independence.<sup>29</sup> Parliament duly passed the National Prosecuting Authority Act (NPA Act) in 1998 to give effect to the constitutional provision dealing with the prosecuting authority and to spell out the details of a new prosecutorial system for the country.<sup>30</sup>

## Recent strategic developments

Despite the various problems encountered by the National Prosecuting Authority (NPA), many argue that it has performed well since being established, especially considering the dysfunctional system it inherited from the apartheid era.

However, several serious challenges still remain, including: poor court performance, a growing backlog of cases, low prosecution rates, growing numbers of sentenced prisoners and prisoners awaiting trial, the need to maintain positive public perceptions, clarifying the role and positioning of its elite crime fighting unit, the Directorate of Special Operations, allegations of criminality among its own members,<sup>31</sup> high staff turnover,<sup>32</sup> and the need to deal with the consequences of complex and politically sensitive investigations into high profile political figures.

The leadership of the NPA identified these challenges and initiated an extensive review of the organization, culminating in Strategy 2020.<sup>33</sup> The key strategic change brought about by Strategy 2020 is summarized in the new mission statement of the NPA:

*Guided by the Constitution, we in the National Prosecuting Authority ensure justice for the victims of crime by prosecuting without fear, favor or prejudice, and by working with our partners and the public to solve and prevent crime.*<sup>34</sup>

This new mission of crime prevention will be served by, *inter alia*, prosecutors taking a problem-solving approach to crime, enhancing their role in guiding investigations, applying case flow management principles, and engaging in joint problem solving with other stakeholders in connection with crime prevention.<sup>35</sup>

Some commentators have criticized this approach, which encompasses crime prevention as being too broad and detracting from the NPA's core function of prosecution, while others are grateful that a government agency perceived to be relatively successful is taking the lead on crime prevention.

29 See *Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC), at para. 146.

30 National Prosecuting Authority Act 32 of 1998.

31 M. Letsoalo, "Ructions rock Scorpions," *Mail & Guardian*, November 3, 2006, (page unknown) [http://www.mg.co.za/articlePage.aspx?articleid=288833&area=/insight/insight\\_\\_national/](http://www.mg.co.za/articlePage.aspx?articleid=288833&area=/insight/insight__national/) (accessed 10 July 2007).

32 During 2005/06 some 20% of all NPA employees resigned. (No author) *Annual Report 2005/06*, National Prosecuting Authority (2007), at 70.

33 *Id.* at 9.

34 *Id.*

35 *Id.*

## II. Structure and Organization of the National Prosecuting Authority

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### 2.1. Internal structure of the National Prosecuting Authority

The NPA is structured internally into business units, arranged under four Deputy National Directors and a Chief Executive Officer. The CEO leads the administrative arm of the NPA, which includes corporate services; an Integrity Management Unit to monitor, evaluate, and maintain the NPA's integrity (including preventing and overseeing the investigation by business units of any internal criminal, unethical, or dishonest behavior or mismanagement)<sup>36</sup>; and an Internal Audit Unit, which is responsible for risk management and governance processes.<sup>37</sup>

The largest of the business units is the National Prosecution Service (NPS), which performs the core function of instituting criminal proceedings on behalf of the state.<sup>38</sup> The remaining business units operate independently of the NPS, providing services that are supportive in nature or involve specialized types of prosecution. Other business units include:

- ▶ The Directorate of Special Operations (DSO), which engages in specialized investigation and prosecution of organized crime, including racketeering and money laundering offenses, complex and serious financial crime, and public and private sector corruption.<sup>39</sup> The DSO was launched by President Thabo Mbeki in September 1999, soon after he became President. Opposition parties voiced concerns that the DSO would become Mbeki's elite "private police force."<sup>40</sup> However the DSO's apparently effective operation and tendency to target the wealthy and powerful,<sup>41</sup> coupled with well-managed publicity, soon made the DSO popular among the public, but brought the unit and the NPA into conflict with the police.
- ▶ The Asset Forfeiture Unit, which focuses on the implementation of civil and criminal asset forfeiture legislation.<sup>42</sup>

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36 The Integrity Management Unit does not have its own investigative capacity. (No author) "Integrity Management Unit," *NPA website*, (undated), <http://www.npa.gov.za/ReadContent386.aspx>

37 *Annual Report 2005/06*, *supra* note 32, at 99.

38 *Id.* at 18.

39 *Id.* at 33.

40 J. Redpath, *The Scorpions: Analyzing the Directorate of Special Operations*, Institute for Security Studies Monograph Series No. 96, March 2004, at 12-13.

41 *Id.* at 50-56.

42 Prevention of Organized Crime Act 121 of 1998, Chapters 5 and 6.

- Four business units that are clustered under the National Special Services Division:
  - ▷ The Witness Protection Unit provides specialized witness protection services to law enforcement agencies, both local and international, under witness protection legislation.<sup>43</sup>
  - ▷ The Priority Crime Litigation Unit, created in 2003 by Presidential proclamation,<sup>44</sup> manages and directs the prosecution of:
    - ◆ Rome Statute<sup>45</sup> crimes, including genocide, crimes against humanity and war crimes.
    - ◆ Crimes against the state, including national and international terrorism.
    - ◆ Contraventions of legislation outlawing mercenary action<sup>46</sup> and nuclear, chemical, and biological weapons proliferation,<sup>47</sup> and legislation governing arms control,<sup>48</sup> the use of nuclear energy,<sup>49</sup> and the intelligence services.<sup>50</sup>
    - ◆ Any prosecutions or missing persons cases arising out of the Truth and Reconciliation Commission process.<sup>51</sup>
  - ▷ Activities of the Sexual Offenses and Community Affairs (SOCA) Unit include formulating appropriate policy in relation to the prosecution of sexual offenses, establishing and maintaining special courts for the prosecution of sexual offenses, developing community awareness programs and training plans around sexual offenses, as well as managing domestic violence cases.<sup>52</sup>
  - ▷ The Specialized Commercial Crime Unit prosecutes complex commercial crime cases emanating from the provincial branches of the South African Police Service.<sup>53</sup>

43 Witness Protection Act 112 of 1998.

44 Proclamation in terms of section 13(1)(c) of the National Prosecuting Authority Act 32 of 1998: (no gazette number) Proclamation by the President of the Republic of South Africa, National Prosecuting Authority Act, 1998, March 24, 2003, <http://www.npa.gov.za/UploadedFiles/PCLU%20PROCLAMATION.tif> (accessed July 20, 2007).

45 Implementation of the Rome Statute of the International Criminal Court, Act 27 of 2002.

46 Regulation of Foreign Military Assistance Act 15 of 1998.

47 Non-Proliferation of Weapons of Mass Destruction Act 87 of 1993.

48 National Conventional Arms Control Act 41 of 2002.

49 Nuclear Energy Act 46 of 1999.

50 Intelligence Services Act 65 of 2002.

51 (No gazette number) Proclamation by the President of the Republic of South Africa, National Prosecuting Authority Act, 1998, 24 March 2003, <http://www.npa.gov.za/UploadedFiles/PCLU%20PROCLAMATION.tif> (accessed 20 July 2007).

52 Offences in terms of the Domestic Violence Act 116 of 1998.

53 *Annual Report 2005/6*, *supra* note 32, at 46.

## 2.2. Internal structure of the National Prosecution Service

The National Prosecution Service is led by a Deputy National Director.<sup>54</sup> Provincial leadership of the NPS is provided by nine Directors of Public Prosecution (DPPs).<sup>55</sup> The primary responsibility for instituting and conducting criminal proceedings lies with the DPPs, in respect of offenses committed in their jurisdiction, except for prosecutions falling within the exclusive authority of the National Director of Public Prosecutions.<sup>56</sup> In practice, the DPPs authorize prosecutors within their jurisdiction to institute and conduct criminal proceedings.<sup>57</sup>

Each DPP is supported by senior managers, that is, Corporate Managers, Deputy Directors of Public Prosecution, and Chief Prosecutors, who have responsibility in the high courts and lower courts respectively.<sup>58</sup> Figure 1 outlines the various types of courts in South Africa. Some 1,567 criminal courts, both high and lower courts, are in session nationally every month, with 1,037 of them being district courts where prosecutors conduct the bulk of prosecutions.<sup>59</sup>

Figure 1: Court Structure in South Africa

Courts	Magistrates' Courts		High Courts	Supreme Court of Appeal	Constitutional Court
	District	Regional			
<b>Offense jurisdiction</b>	Not murder, rape or treason	Not treason	All offenses	Appeals only	Constitutional matters
<b>Sentencing jurisdiction</b>	3 years*	15 years*	Unlimited	Unlimited	Unlimited
<b>Presiding officers</b>	Magistrates	Regional Magistrates	Judges	Judges of Appeal	Constitutional Court Judges
<b>No. of presiding officers</b>	1,500	285	210	20	11

\* Unless specifically extended by legislation.

<sup>54</sup> *Id.* at 18.

<sup>55</sup> South Africa is comprised of nine provinces. (No author) "Directors of Public Prosecutions," (undated), [http://www.npa.gov.za/UploadedFiles/Directors%20of%20Public%20Prosecutions%20\(NPA\).doc](http://www.npa.gov.za/UploadedFiles/Directors%20of%20Public%20Prosecutions%20(NPA).doc)

<sup>56</sup> (No author) "Career Opportunities at the NPA," (undated), <http://www.npa.gov.za/UploadedFiles/Career.pdf>

<sup>57</sup> *Id.*

<sup>58</sup> M. Mpshe, "Justice in our society so that people can live in freedom and security," *Stakeholder Conference 2007 hosted by the NPA*, March 28, 2007, at 3.

<sup>59</sup> C. De Beer, "Charts of National Performance Overview 2002-2005", (undated), NPA spreadsheet obtained via email communication, May 26, 2006 (no page numbers).

Deputy Directors of Public Prosecutions oversee and conduct prosecutions in the High Courts. In addition, there are several senior state advocates and state advocates (who, unlike Senior Public Prosecutors and prosecutors, have a right of appearance in the High Court), who conduct most of the High Court prosecutions. Deputy Directors usually prosecute the most serious and contentious cases, while DPPs rarely appear in court.

The lower courts are overseen by 36 Chief Prosecutors, who are each responsible for an allocated number of magisterial district areas. There are 354 magisterial district areas in the country.<sup>60</sup> The Chief Prosecutor is responsible for the overall management of all the prosecutors in his area of responsibility. This management role is largely related to administrative issues, however, and the Chief Prosecutor seldom interferes with prosecutors' day-to-day prosecutorial decision-making.

*Office organization:* Each office, depending on its size, may have a Chief Prosecutor and/or one or more Senior Public Prosecutors (SPPs) and/or Control Prosecutors (responsible for case allocation) who provide leadership and oversight at that court center, plus Public Prosecutors. Individual offices generally have their own internal arrangements and hierarchy structures; there is no standard or mandatory pattern.

Prosecutors assigned to prosecute in the regional court at a court center are termed regional court prosecutors. Those assigned to prosecute in the district courts are termed district court prosecutors. A very small court center may have only a district court (more serious cases are referred to the nearest regional court) with a small prosecutors' office headed by a senior (with a small "s") prosecutor and not a Senior Public Prosecutor. By contrast, larger offices normally have more than one SPP among whom responsibilities are divided.

The SPP is responsible for the general management of the prosecutors under him and can overrule prosecutorial decisions taken by any prosecutor under him. In practice, the decision whether to prosecute most serious and high-profile regional cases is taken by the SPP as a matter of course. The SPP is also usually the only prosecutor in the office who can take informal appeals from the public on matters within the relevant court's jurisdiction.<sup>61</sup>

*Policy hierarchy:* The National Director has broad authority over prosecutors in the exercise of all their duties.<sup>62</sup> The National Director sets policy for the NPA, with the concurrence of the Minister of Justice and after consulting the provincial Directors.<sup>63</sup> The Minister's right of concurrence means that he can effectively veto policy proposals, but the National Director can disregard provincial Directors' advice.<sup>64</sup>

60 (No author) "Magisterial Districts," *Statistics South Africa Website*, (undated) <http://www.statssa.gov.za/census01/census96/HTML/Metadata/Codelists/Magdist.html> (accessed July 3, 2007).

61 These include appeals to have charges dropped, admission of guilt fines reduced (very common in respect of traffic infringements), or to reconsider a decision not to prosecute.

62 National Prosecuting Authority Act 32 of 1998, section 22(1).

63 Constitution of the Republic of South Africa Act 108 of 1996, section 179(5)(a), and National Prosecuting Authority Act 32 of 1998, section 21(1).

64 Van Zyl Smit & Steyn, *supra* note 17, at 9.

The National Director issues policy directives which “must be observed in the prosecution process.”<sup>65</sup> The first Prosecution Policy had to be submitted to Parliament within six months of the National Director being appointed.<sup>66</sup> The first set of policy directives came into operation in 1999, “to deal with all the professional duties of prosecutors,”<sup>67</sup> and all subsequent amendments must be included in the National Director’s annual report to the Minister who, in turn, submits it to Parliament for a vote.<sup>68</sup>

A provincial Director may also issue circulars with general instructions to prosecutors in her jurisdiction, provided these are not inconsistent with the policy directives of the National Director.<sup>69</sup> The NPA has also issued prosecutors with an ethics manual.<sup>70</sup>

*Prosecutors’ decisional authority:* The National Director can intervene in any prosecution process in which policy directives are not being followed.<sup>71</sup> Even if a prosecutor follows all policy directives, the National Director may still review his decision to prosecute or not prosecute after consulting the relevant Director and taking representations from the accused, the complainant, and any other person whom the Director considers relevant.<sup>72</sup> However, the Director may not intervene in the conduct of the case other than the decision to prosecute.<sup>73</sup> More broadly, the National Director may conduct any investigation he deems necessary concerning a prosecution, and may order provincial Directors to submit reports on any case or prosecution.<sup>74</sup> The National Director’s power to review decisions to prosecute can serve to ensure that prosecutorial independence is not abused. However, this power also poses a “potential danger that the National Director could prevent a prosecution that would be politically embarrassing.”<sup>75</sup>

In practice, prosecutors of a more senior rank with administrative authority over junior colleagues in a territorial jurisdiction can overrule a prosecutor’s decision whether to prosecute or not.<sup>76</sup> This happens frequently at the lower levels of the prosecution service, with inexperienced junior prosecutors asking their seniors for advice

65 National Prosecuting Authority Act 32 of 1998, section 21(1).

66 National Prosecuting Authority Act 32 of 1998, section 21(2).

67 (No Author) *National Prosecuting Authority of South Africa Policy Manual*, National Prosecuting Authority, October 1999, at B.1.

68 National Prosecuting Authority Act 32 of 1998, section 21(2).

69 National Prosecuting Authority Act 32 of 1998, section 24(4)(c)(ii)(bb) read with section 24(5).

70 (No author) *Ethics: A practical guide to the ethical code of conduct for members of the National Prosecuting Authority*, National Prosecuting Authority, March 2004. The manual is authored by the NPA’s Research and Policy Information Service Centre and vetted by the organization’s senior leadership. It covers a wide array of issues, including serving the public interest, prosecutors’ duties to the court, prosecutors’ responsibilities to unrepresented accused, professional integrity and responsibility, and how prosecutors should interact with defense lawyers and state witnesses. The manual is advisory and describes its aim as “merely to provide a practical guide that will point prosecutors in the right direction” (at iv).

71 National Prosecuting Authority Act 32 of 1998, section 22(2)(b).

72 National Prosecuting Authority Act 32 of 1998, section 22(2)(c).

73 Van Zyl Smit & Steyn, *supra* note 17, at 9.

74 National Prosecuting Authority Act 32 of 1998, section 22(4)(a).

75 J. Sarkin and S. Cowen, “The draft National Prosecuting Authority Bill: A critique,” *South African Criminal Journal* (No. 1, 1997), at 70.

76 See National Prosecuting Authority Act 32 of 1998, section 25.



and guidance in individual cases. Among middle and higher ranks of the prosecution service, however, such interference—especially if unsolicited—is rare.

*Other central functions affecting policy:* The annual budget proposal prepared by the Department of Justice includes “service delivery” objectives and indicators, with quantifiable goals for performance in certain functional areas<sup>77</sup> and performance indicators—such as, for example, conviction rates, number of incidents threatening witness safety, and average court cycle times.<sup>78</sup>

In addition, all prosecutors are required to sign a performance contract when they are appointed, and all senior managers (above the level of Deputy Director) are required to sign standardized yearly performance contracts; these contracts outline the key performance indicators for the individual prosecutor.

All human resource functions of the prosecution service—for appointment, transfer, discipline, and dismissal—are centralized in Corporate Services at the head office of the NPA. For example, if a senior prosecutor in a specific office wants to appoint additional staff, he must submit a request through the provincial Director to the head office. If approved, the position is advertised and the human resources division at the head office conducts a short-listing process.

### 2.3. Budgetary process

Each year the Department of Justice, in consultation with the National Director, prepares a budget proposal for the NPA.<sup>79</sup> Parliament then votes a budget for the NPA, out of which the NPA has to pay all its expenses.<sup>80</sup> The Director-General of Justice<sup>81</sup> accounts for state monies received or paid on behalf of the NPA.<sup>82</sup>

The Department of Justice provides the National Treasury with a budget estimate for the forthcoming year. This document, together with those of all other national government departments, is submitted to Parliament by the Minister of Finance in his annual national budget speech, and is at that point a public document.

The Department of Justice’s budget proposal contains a separate section for the NPA, which typically includes one- and three-year budget estimates broken down by

77 These areas include, for example, prosecution of criminal cases; access to justice for women and children; confident and safe witnesses in court for the witness protection program. See (no author) 2004 *Estimates of National Expenditure, Safety and Security*, Vote 25, National Treasury, February 2004, Pretoria, at 649-652.

78 (No author) 2004 *Estimates of National Expenditure, Safety and Security*, Vote 25, National Treasury, February 2004, Pretoria, at 649-652.

79 National Prosecuting Authority Act 32 of 1998, section 36(2).

80 National Prosecuting Authority Act 32 of 1998, section 36(1).

81 The Director-General is the highest ranking public servant in a national government department, reporting directly to the Minister.

82 National Prosecuting Authority Act 32 of 1998, section 36(3)(a).

functional area and economic classification.<sup>83</sup> The budget proposal also includes “service delivery” objectives and indicators for the functional areas for the forthcoming year.<sup>84</sup>

## **2.4. The status of the Prosecutor General (National Director) and his deputies**

The political status of the National Director is high; he reports directly to the Minister of Justice. The reporting lines of the NPA run parallel to that of the Department of Justice. In essence the NPA is an entity entirely separate from the Department of Justice.

The NPA Act, as required by the Constitution, makes provision for the establishment of a single National Prosecuting Authority, headed by the National Director. The National Director is appointed by the President for a non-renewable term of ten years, and can only be removed by the President and Parliament for misconduct, sustained ill-health, incapacity, or because he generally is not a fit or proper person for office.<sup>85</sup> The appointment is largely discretionary.<sup>86</sup> The President also sets the remuneration and terms of service for the National Director, provided that the salary of the National Director is at least that of a High Court judge.<sup>87</sup>

The National Director has complete authority over all members as well as over the exercising of all powers by members of the prosecution service.<sup>88</sup> The National Director may review a decision to prosecute or not.<sup>89</sup> This power does *not*, however, give the National Director the authority to intervene with the way in which a case is being prosecuted.<sup>90</sup> However, when policy directives are not being complied with in any prosecution process, the National Director may intervene.<sup>91</sup>

In practice, the National Director receives representations from the public relating to the way in which specific cases are being prosecuted. If deemed necessary, a meeting is arranged with the provincial Director in the relevant province to discuss the case in question. The DPP has the final say on the way in which the case is prosecuted within the relevant jurisdiction, within the bounds of policy directives.

The National Director determines and issues policy directives,<sup>92</sup> but this is in consultation with (“in consultation with” implies consensus is required) the Minister of

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83 See, e.g., (no author) *2007 Estimates of National Expenditure, Vote 22, Justice and Constitutional Development*, National Treasury, February 2007, Pretoria, <http://www.treasury.gov.za/>

84 See, e.g., *id.*

85 National Prosecuting Authority Act 32 of 1998, section 12(1).

86 Whomever the President appoints must have legal qualifications to practice law in all courts of the country, be a South African citizen and “be a fit and proper person.” National Prosecuting Authority Act 32 of 1998, section 9(1).

87 National Prosecuting Authority Act 32 of 1998, section 17(1). In practice, the National Director’s salary is stable, and usually reflects an annual cost-of-living increase.

88 National Prosecuting Authority Act 32 of 1998, section 22(1).

89 National Prosecuting Authority Act 32 of 1998, section 22(2)(c).

90 Van Zyl Smit & Steyn, *supra* note 17, at 14.

91 National Prosecuting Authority Act 32 of 1998, section 22(2)(b).

92 National Prosecuting Authority Act 32 of 1998, section 22(2)(a).

Justice and the provincial DPPs.<sup>93</sup> The National Director does not directly appoint senior staff. The President or the Minister of Justice makes the senior appointments.

The President appoints up to four Deputy National Directors of Public Prosecutions, after consultation with the Minister of Justice and the Deputy National Director of Public Prosecutions.<sup>94</sup> Deputy National Directors hold office until the age of 65, unless they choose to vacate office or are removed for misconduct or inability to hold office.<sup>95</sup>

The President also appoints, after consultation with the Minister of Justice and National Director, provincial Directors of Public Prosecutions.<sup>96</sup> The Minister of Justice appoints provincial Deputy Directors of Public Prosecutions after consultation with the National Director.<sup>97</sup> As with the National Director, the remuneration and terms and conditions of service of the Deputy National Directors and the provincial Directors are determined by the President.<sup>98</sup>

The National Director must submit an annual report to the Minister of Justice, which the Minister must then submit to Parliament within 14 days of its next sitting.<sup>99</sup> The report must include information on the activities of the National Director, his senior staff and the prosecuting authority as a whole; the personnel situation of the NPA; the financial status of the administration and operation of the NPA; recommendations or suggestions regarding the prosecuting authority; information relating to training programs for prosecutors; and any other information the National Director deems necessary.<sup>100</sup> At his discretion, the National Director may also submit to the Minister or Parliament reports on matters relating to the prosecution service.<sup>101</sup>

The National Director, Deputy National Directors and Directors must give written notice to the Minister of Justice of all direct and indirect pecuniary interests. Moreover, Directors and Deputy Directors may not perform any paid work outside their official duties without the consent of the President.<sup>102</sup>

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93 National Prosecuting Authority Act 32 of 1998, section 21(1).

94 National Prosecuting Authority Act 32 of 1998, section 11(1).

95 National Prosecuting Authority Act 32 of 1998, section 12(6), (7) and (8).

96 National Prosecuting Authority Act 32 of 1998, section 13(a).

97 National Prosecuting Authority Act 32 of 1998, section 15(1)(a).

98 National Prosecuting Authority Act 32 of 1998, section 17(1). The salary of a Deputy National Director may not be less than 85% of the National Director's salary, and the salary of a provincial Director may not be less than 80% of the National Director's.

99 National Prosecuting Authority Act 32 of 1998, section 35(2)(a).

100 National Prosecuting Authority Act 32 of 1998, section 22(4)(g).

101 National Prosecuting Authority Act 32 of 1998, section 35(2)(b).

102 National Prosecuting Authority Act 32 of 1998, section 39.

## 2.5. The status of individual prosecutors

Prosecutors are appointed on the recommendation of the National Director.<sup>103</sup> However, the Minister, in consultation with the National Director and after consultation with the provincial Directors, prescribes the appropriate legal qualifications for the appointment of a person as prosecutor in a lower court.<sup>104</sup> Line prosecutors' career paths are largely governed by public service rules. Conditions of service of Deputy Directors and prosecutors, except remuneration, must be determined according to the Public Service Act, including the advertisement of positions, appointment, benefits, disciplinary actions, and dismissal. Promotions are determined at head office level on the basis of performance reports received from line managers.

*Appointment:* According to the Public Service Act, anyone appointed to the public service must be a South African citizen, of good character, and someone who complies with any prescribed requirements.<sup>105</sup>

Due regard to equality and the other democratic values and principles enshrined in the Constitution must be taken into account in making appointments. All persons who qualify for the appointment must be considered. Evaluation of persons must be based on training, skills, competence, knowledge, and the need to redress the imbalances of the past to achieve a public service broadly representative of the South African people, including representation according to race, gender, and disability.<sup>106</sup>

The NPA's staffing should "reflect broadly the racial and gender composition" of the country.<sup>107</sup> Some 70 percent of the NPA's employees are from "previously disadvantaged" racial population groups, while women comprise 47 percent.<sup>108</sup> However, the Indian/Asian (6 percent) and white (30 percent) racial groups are respectively 2.5 and 3.2 times over-represented compared to the racial composition of the country as a whole.<sup>109</sup>

*Tenure:* The security of tenure of prosecutors below the level of Director is the same as for any government employee, as dictated by the Public Service Act.<sup>110</sup> According to the Act, public servants may only be dismissed on a number of prescribed grounds. These include continued ill-health, the abolition of a post or institutional reorganization, where a dismissal will promote efficiency in the department where

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103 National Prosecuting Authority Act 32 of 1998, section 16(1): "Prosecutors shall be appointed on the recommendation of the National Director or a member of the prosecuting authority designated for that purpose by the National Director, and subject to the laws governing the public service."

104 National Prosecuting Authority Act 32 of 1998, section 16(2).

105 Public Service Act 103 of 1994, section 10(1).

106 Public Service Act 103 of 1994, section 11(1).

107 National Prosecuting Authority Act 32 of 1998, section 8.

108 *Annual Report 2005/6*, *supra* note 32, at 74.

109 According to the mid-year population estimates published by Statistics South Africa on July 3, 2007, the SA population is 79.6% black, 9.1% white, 8.9% Colored, and 2.5% Indian/Asian; and 50.7% female. (no author) *Mid-Year Population Estimates 2007* Statistics South Africa, July 3, 2007, at 1, <http://www.statssa.gov.za/PublicationsHTML/P03022007/html/P03022007.html> (accessed July 20, 2007).

110 National Prosecuting Authority Act 32 of 1998, section 19. Public Service Act 103 of 1994, section 17(2).

the person concerned is employed, where it is in the interest of the public service, on account of unfitness to perform the job or incapacity to perform it efficiently, on account of misconduct, or where continued employment constitutes a security risk for the state.<sup>111</sup> During the first 12 months of their appointment, prosecutors below the level of Director are on probation and can be dismissed with one month's written notice, or immediately if the person's conduct is unsatisfactory.<sup>112</sup>

Unless one or more of the aforementioned reasons for dismissal is present, prosecutors below the level of Director have security of tenure until they reach the age of 65, at which time they are generally obliged to retire.<sup>113</sup>

*Promotion:* Prosecutors below Director level are paid a salary in accordance with the scale for rank and grade determined by the Minister of Justice, after consultation with the National Director and the Minister of Public Service and Administration and with the concurrence of the Minister of Finance, and subject to Parliament's approval.<sup>114</sup> The salary scales of prosecutors (including Deputy Directors) must be published in the Government Gazette.<sup>115</sup> A reduction in the salaries of Deputy Directors and prosecutors requires an Act of Parliament.<sup>116</sup>

*Restriction on activities:* Prosecutors, as public servants, may not perform outside remunerative work without authorization from the National Director.<sup>117</sup> Prosecutors may not accept any gift, donation, treat, favor, or sponsorship (other than in a *bona fide* private capacity) which may compromise, or may appear to compromise, their professional integrity or that of the profession as a whole.<sup>118</sup>

Prosecutors are permitted to join unions. Most belong to a union representing either public servants or prosecutors specifically.<sup>119</sup> Many senior prosecutors also belong to a professional association for state advocates.<sup>120</sup> Prosecutors, as public servants, may belong to and serve on the management of a lawful political party and attend public political meetings, but they may not preside or speak at such meetings and are prohibited from drawing up or publishing any writing or delivering a public speech to promote or prejudice the interests of any political party.<sup>121</sup>

Prosecutors perform an "essential service," under the terms of labor legislation.<sup>122</sup> The import of this is that participation in a strike may constitute a fair reason for dismissal (i.e., the strike is illegal and not protected).<sup>123</sup> However, in both 2001 and

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111 Public Service Act 103 of 1994, section 17(2).

112 Public Service Act 103 of 1994, section 13(5).

113 Public Service Act 103 of 1994, section 16(1).

114 National Prosecuting Authority Act 32 of 1998, section 18(1).

115 National Prosecuting Authority Act 32 of 1998, section 18(1).

116 National Prosecuting Authority Act 32 of 1998, section 18(6).

117 Public Service Act 103 of 1994, section 30.

118 (No Author) *National Prosecuting Authority of South Africa Policy Manual*, National Prosecuting Authority, October 1999, at B.121.

119 Public Service Association (PSA) and National Union of Prosecutors of South Africa (NUPSA).

120 Society of State Advocates.

121 Public Service Act 103 of 1994, section 36.

122 *Government Gazette* GNR.1216 of September 12, 1997.

123 Section 68(5), Labor Relations Act 66 of 1995.

2007 prosecutors participated in strike action during public servants' strikes.<sup>124</sup> It is unclear whether dismissals of prosecutors followed these strikes.

## 2.6. Individual accountability of prosecutors

A member of the NPA is obliged to "serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favor or prejudice and subject only to the Constitution and the law."<sup>125</sup> Prosecutors must take an oath or make an affirmation to this effect.<sup>126</sup> No one may interfere with or obstruct the work of the prosecuting authority.<sup>127</sup>

*Evaluation:* Senior Public Prosecutors and Chief Prosecutors are responsible for the day-to-day management of the prosecutors under their control. SPPs must complete progress and evaluation reports for all prosecutors in their office; these reports are submitted to the Chief Prosecutor and provincial Director. After approval by the Director, the reports are submitted to the NPA's human resources department at head office. Such reports influence the awarding of promotions and performance bonuses. During 2005-06, some 96 percent of all posts in the NPA were evaluated.<sup>128</sup>

*Disciplinary procedures:* The National Director is obliged, after consultation with the Deputy National Directors and Directors, to advise the Minister of Justice on creating a process allowing individuals to register complaints about improper conduct by members of the NPA.<sup>129</sup> The Integrity Management Unit launched a dedicated toll-free integrity telephone "hotline" in 2005 to provide both NPA employees and the public with a mechanism to report concerns.<sup>130</sup>

Disciplinary hearings<sup>131</sup> are carried out in accordance with applicable labor law.<sup>132</sup> A total of 63 reports of misconduct were addressed in 2005-06, resulting in 22 internal disciplinary hearings.<sup>133</sup> More than a third (36 percent) of the allegations of misconduct related to theft, bribery, corruption, defeating the ends of justice, or fraud.<sup>134</sup>

124 P. Govender, and B. Naidu, "Three case studies paint a gloomy picture of bread-and-butter issues in the civil service," *Sunday Times*, June 3, 2007, (page unknown).

125 National Prosecuting Authority Act 32 of 1998, section 32(1)(a).

126 National Prosecuting Authority Act 32 of 1998, section 32(2)(a).

127 National Prosecuting Authority Act 32 of 1998, section 32(1)(b). *See also* National Prosecuting Authority Act 32 of 1998, section 41(1) (providing for a fine or imprisonment for such an offense).

128 *Annual Report 2005/6*, *supra* note 32, at 67.

129 National Prosecuting Authority Act 32 of 1998, section 22(5).

130 *Id.* at 15.

131 A "disciplinary hearing" is a formal procedural step at which the employee has an opportunity to present her case against the employer's allegations, before an employer may dismiss an employee, even in the case of serious misconduct such as assault or theft.

132 Labor relations in the public service are governed by a myriad of acts. The legislative framework is further enhanced through a number of collective agreements reached in the Public Service Coordinating Bargaining Council (PSCBC) and the various sectoral bargaining councils. In this context, the Disciplinary Code and Procedures for the Public Service, effective as of July 1, 1999, and Schedule 8: Code of Good Practice: Dismissal Public Service Act 66 of 1995 are particularly relevant.

133 *Annual Report 2005/6*, *supra* note 32, at 85.

134 *Id.*



*Civil and criminal liability:* Traditionally, individual prosecutors are not criminally or civilly liable for anything they do in “good faith” in performance of their duties.<sup>135</sup> The state is held vicariously liable for any wrongful conduct (including negligent acts or omissions) by any prosecutor acting in his official capacity.<sup>136</sup> This has been extended to cover damage inflicted by a party unrelated to the state, as a result of negligence on the part of a state official.<sup>137</sup>

*Code of conduct:* The NPA has a code of conduct, with which all prosecutors must comply.<sup>138</sup> Prosecutors’ performance contracts include an undertaking to comply with the code of conduct, and prosecutors who fail to comply with the code can have internal disciplinary proceedings instituted against them.<sup>139</sup> The National Director drafts the code of conduct for the NPA in consultation with the Minister of Justice, the Deputy National Directors, and the provincial DPPs.<sup>140</sup> The code of conduct must be published in the *Government Gazette*, and all new prosecutors receive a copy. The code of conduct emphasizes the essential need for prosecutions to be fair and effective and for prosecutors to act without fear, favor or prejudice.<sup>141</sup> It contains a number of specific prescriptions on how this is to be accomplished.<sup>142</sup>

## 2.7. Training of prosecutors

*Preparatory education:* Legal and investigation positions in the NPA at entry level must be advertised externally, excluding positions earmarked for Aspirant Prosecutors and DSO Trainee Investigators.<sup>143</sup> Aspirant Prosecutors must have a school Senior Certificate pass with matriculation exemption (i.e. university entrance pass) followed by a minimum of a B. Juris diploma, but preferably a Bachelor of Laws (LLB).

Thereafter, prosecutors undergo an Aspirant Prosecutor Training Course, a six-month program offered by the NPA at Justice College.<sup>144</sup> Justice College is a branch of the Department of Justice that is responsible for the training of magistrates, prosecutors, clerks of the court, interpreters, and other court officials.<sup>145</sup> The continued employment of all new employees in the NPA is subject to a twelve-month probation

135 National Prosecuting Authority Act 32 of 1998, section 42.

136 State Liability Act 20 of 1957, section 1.

137 *Minister of Safety & Security & another v Carmichele* [2003] JOL 12119 (SCA).

138 National Prosecuting Authority Act 32 of 1998, section 22(6)(a).

139 In terms of applicable labor legislation.

140 National Prosecuting Authority Act 32 of 1998, section 22(6)(b). In framing the code of conduct account was taken of the values and principles enshrined in the Constitution, the aims set out in the National Prosecuting Authority Act, and the United Nations Guidelines on the Role of Prosecutors.

141 See *National Prosecuting Authority of South Africa Policy Manual*, *supra* note 118, at C.1.

142 *Id.* at C.2 – C.4.

143 (No publisher) National Prosecuting Authority, 2004, *Recruitment, Selection and Appointment Policy for the National Prosecuting Authority*, at 3.1.1(b), <http://www.npa.gov.za/UploadedFiles/Recruitment%20Policy.doc> (accessed July 10, 2007).

144 (No publisher) National Prosecuting Authority, undated, *Career Opportunities at the NPA* at (no page numbers) <http://www.npa.gov.za/UploadedFiles/Career.pdf> (accessed July 7, 2007).

145 (No publisher) Department of Justice and Constitutional Development, 2007, *Justice College Work Program 2007-08*, at cover page.



period.<sup>146</sup> The probationary period may be reduced or excluded under certain conditions.<sup>147</sup> Prosecutors who are Advocates of the High Court with an LLB qualification and at least two years prosecutorial experience can become state advocates and argue cases in the High Court.<sup>148</sup>

*Continuing training:* Yearly national training is organized for all prosecutors, including refresher courses in general criminal procedure, evidence, and trial advocacy, and dedicated training in the latest legal developments relevant for prosecutors.<sup>149</sup> Such training occurs via a selection process, as places on courses are limited.<sup>150</sup> A detailed record is kept of prosecutors' attendance. The NPA also encourages staff members to further their professional qualifications. Various scholarship schemes are offered to employees, ranging from full scholarships to interest-free student loans. Training is recorded on employees' employment records and consequently considered together with performance reports for evaluation purposes.

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### **III. Functions and Powers of Prosecutors**

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#### **3.1. Prosecutorial functions in criminal justice**

Prosecutors institute, conduct, and discontinue criminal proceedings on behalf of the state, and may carry out any activities necessary or incidental to these functions.<sup>151</sup> South Africa's criminal procedure is based on an accusatorial system in which the judge plays the role of a detached umpire.<sup>152</sup> South Africa does not have a pure accusatorial system, however, and elements of the inquisitorial approach have been adopted, particularly where this is necessary to protect vulnerable accused persons. For example, a presiding officer may not simply accept a plea of guilty, but must question an accused pleading guilty to establish whether in fact the accused should be found guilty.<sup>153</sup>

Prosecutors' primary function is "to assist the court in ascertaining the truth."<sup>154</sup> A prosecutor is ethically bound to display the highest degree of fairness to an ac-

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146 *Recruitment, Selection and Appointment Policy for the National Prosecuting Authority*, *supra* note 143, at 3.1.1(b).

147 *Id.*

148 *Career Opportunities at the NPA*, *supra* note 144.

149 *See inter alia* (no publisher) Department of Justice and Constitutional Development, 2007, *Justice College Work Program 2007-08*.

150 *Id.*

151 National Prosecuting Authority Act 32 of 1998, section 20(1).

152 T. Geldenhuys & J. J. Joubert, et. al., *Criminal Procedure Handbook*, Kenwyn: Juta (1994), at 14.

153 Criminal Procedure Act 51 of 1977, section 112.

154 *S v Jija* 1991 (2) SA 52 (E).

cused.<sup>155</sup> Thus, information favorable to the defense must be disclosed,<sup>156</sup> and if there is a discrepancy between a witness's oral testimony in court and earlier written statement, the prosecutor must draw attention to this fact and make the written statement available to the defense for purposes of cross-examination.<sup>157</sup> This legal position is reflected in the NPA policy manual.<sup>158</sup>

In practice, however, prosecutors' performance is measured predominantly by their conviction rate—the number of successful convictions as a proportion of prosecutions. Consequently, there is pressure on prosecutors to: (a) secure a conviction where a prosecution has been initiated, and (b) to decline to initiate a prosecution unless a conviction is assured.<sup>159</sup>

*Discretion to initiate prosecution:* South Africa does not have a system of mandatory prosecution. Rather, a prosecutor has a duty to prosecute if there is a *prima facie* case and there is no compelling reason for a refusal to prosecute.<sup>160</sup> A *prima facie* case means that the allegations and supporting statements available to the prosecution are of such a nature that if proved in a court of law on the basis of admissible evidence, the court should convict.<sup>161</sup> The prosecution does not have to ascertain whether there is a defense, but whether there is reasonable and probable cause for prosecution.<sup>162</sup> Prosecutor policy guidelines lay down that “the test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution.”<sup>163</sup>

Prosecutors must act impartially and in good faith. “They should not allow their judgment to be influenced by factors such as their personal views regarding the nature of the offense or the race, ethnicity or national origin, sex, religious beliefs, status, political views or sexual orientation of the victim, witnesses or the offender.”<sup>164</sup> More broadly, the NPA as a whole and individual prosecutors are to exercise this discretion so as to “make the prosecution process more fair, transparent, consistent and predictable.”<sup>165</sup>

According to NPA policy, however, prosecutors may decline to prosecute even prospectively successful cases should the “public interest demand otherwise.”<sup>166</sup> In determining the public interest, prosecutors are supposed to consider factors such as the nature and seriousness of the offense, the interests of the victim and the broader community, and the circumstances of the offender.<sup>167</sup> This aspect of NPA policy has

155 *S v Mofokeng* 1992 (2) SACR 261 (O) at 264C.

156 *S v Van Rensburg* 1963 (2) SA 343 (N).

157 *S v Kamte* 1992 (1) SACR 677 (A).

158 National Prosecuting Authority of South Africa Policy Manual, *supra* note 118, at B.4.

159 See M. O'Donovan, J. Redpath, & V. Karth, *Indicators for Community Courts (draft report)*, Cape Town: Open Society Foundation for South Africa (June 2007), at 17 *et. seq.*

160 T. Geldenhuys, & J. J. Joubert, *et. al.*, *supra* note 152, at 50.

161 *Id.*

162 *Beckenstrater v Rotcher and Theunissen* 1955 (1) SA 129 (A) at 137.

163 (No publisher) National Prosecuting Authority, (undated), *Prosecution Policy*, at A3.

164 *Id.* at A2.

165 *Id.* at A1. However, the Policy is written in “general terms to give direction rather than to prescribe... to ensure consistency by preventing unnecessary disparity, without sacrificing the flexibility that is often required to respond fairly and effectively to local conditions.” *Id.* at A2.

166 *Id.* at A4-A5.

167 *Id.* at A5-A6.

only a limited echo within the law. For example, where the offense is trivial,<sup>168</sup> the accused is very old or very young,<sup>169</sup> or where there are tragic personal circumstances of the accused,<sup>170</sup> the case law indicates this may justify a decision not to prosecute a prospectively successful case.

In practice, NPA policy allowing for a decision not to prosecute has been broadly interpreted, making a decision to prosecute the exception rather than the rule. Thus in 2005-06, the NPA received 517,101 new dockets from the police, but prosecutions were instituted in only 74,059 (14 percent) of cases, and declined in 307,362 (60 percent), while 136,589 cases (26 percent) were referred for further investigation.<sup>171</sup>

Furthermore, in practice the prosecution often does not have all the information required to make a decision on whether to prosecute on first appearance of the accused. For example, dockets sent to prosecutors may fail to indicate that fingerprint results are pending.<sup>172</sup> But any matter that has been withdrawn before an accused has pleaded to the charge can be prosecuted on the same or related charges, where new evidence is subsequently discovered.<sup>173</sup>

However, if a case is *stopped* after an accused has pleaded to the charge but before conviction, the accused is entitled to an acquittal and cannot be prosecuted in respect of the same facts again.<sup>174</sup> A case can only be stopped with the consent of the National Director or a person authorized by the National Director.<sup>175</sup>

A court will not interfere with a *bona fide* (good faith) decision to prosecute<sup>176</sup> or not to prosecute,<sup>177</sup> nor will it compel a decision on whether to prosecute within a specified time period.<sup>178</sup> However, the exercise of discretion by a DPP can be reviewed by the courts on the basis of ordinary administrative law grounds of review, such as *male fides* (bad faith).<sup>179</sup>

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168 *S v Snyman* 1980 SACC 313, at 314.

169 *Stoker & Van Der Merwe* 1981 SACC 73.

170 *See Richings* 1977 SACC 143, in which the accused's negligent driving caused the death of his young children.

171 C. De Beer, "Charts of National Performance Overview 2002-2005" (undated), NPA spreadsheet obtained via email communication, May 26, 2006, (no page numbers).

172 *See, e.g.* S. Johnston, "Robbery victim told: We see you," *Die Burger*, July 12, 2007, [http://www.news24.com/News24/South\\_Africa/News/0,,2-7-1442\\_2145523,00.html](http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_2145523,00.html) (accessed July 12, 2007).

173 Criminal Procedure Act 51 of 1977, section 6(a).

174 Criminal Procedure Act 51 of 1977, section 6(b).

175 Criminal Procedure Act 51 of 1977, section 6(b).

176 *Allen v Attorney-General* 1936 CPD 302.

177 *Gillingham v Attorney-General* 1909 TS 572.

178 *Wronsky v Prokureur-Generaal* 1971 (3) SA 292 (SWA).

179 *See Mitchell v Attorney-General*, Natal 1992 (2) SACR 68 (N).

*Pre-trial diversion:* Probation officers are empowered to investigate the circumstances of an accused to provide a pre-trial report recommending to the prosecution the esir-ability or otherwise of prosecution.<sup>180</sup>

All children who are arrested must be assessed for diversion before their first appearance in court.<sup>181</sup> Newly established Community Courts in South Africa also routinely assess adult accused persons charged with less serious offenses.<sup>182</sup> The prosecution then has quasi-judicial discretion on whether to follow the recommendation of a probation officer and withdraw a matter for diversion, or to proceed with prosecution. The final decision on the fate of an accused is thus in the hands of the prosecution.

In practice, the extent of diversion, particularly of adults, is severely limited by the lack of availability of appropriate diversion programs. Thus during 2005-06, the prosecution diverted 37,516 cases, compared to the 335,028 cases that were finalized with a verdict in court.<sup>183</sup>

*Private prosecutions:* If the prosecution declines to prosecute, any person with a substantial interest in the matter (such as a victim or close relative of the victim) may institute a private prosecution.<sup>184</sup> A private prosecutor may only prosecute after obtaining a certificate *nolle prosequi* from the National Director stating that prosecution is declined; the grant of the certificate may not be refused.<sup>185</sup> However, the courts have held that an applicant for such a certificate must show he or she has the relevant interest in the matter concerned.<sup>186</sup>

A private prosecutor must deposit a sum of money with the court, currently R 1,500 (US\$ 215),<sup>187</sup> which is forfeited if the private prosecutor fails to prosecute or if the case is dismissed.<sup>188</sup> An additional amount, set by the court as security for the costs which the accused person may incur in his defense, must also be deposited with the court.<sup>189</sup> If the private prosecution fails, the court may order the prosecutor to pay the costs of the accused.<sup>190</sup> If the prosecution was “unfounded and vexatious,” the court may order additional costs to be paid to the accused.<sup>191</sup> If the private prosecution succeeds, the court may order the accused or the state to pay the costs of prosecution.<sup>192</sup>

In practice, private prosecutions are rare.<sup>193</sup> This may be because those who have the means to institute private prosecution may prefer to bring a civil action, in which the

180 Probation Services Act 116 of 1991, section 4(1)(i) and (j).

181 Probation Services Act 116 of 1991, section 4B.

182 See O'Donovan, Redpath & Karth, *supra* note 159, at 3.

183 De Beer, *supra* note 171.

184 Criminal Procedure Act 51 of 1977, section 7(1).

185 Criminal Procedure Act 51 of 1977, section 7(2)(a) and (b).

186 *Singh v Minister of Justice & Constitutional Development, RSA & another* [2006] JOL 18049 (N).

187 Government Gazette GNR.239 of 14 February 2003: *Determination of amounts for the purposes of certain provisions of the Criminal Procedure Act, 1977.*

188 Criminal Procedure Act 51 of 1977, section 9(1)(a) and 9(3).

189 Criminal Procedure Act 51 of 1977, section 9(1)(b).

190 Criminal Procedure Act 51 of 1977, section 16(1).

191 Criminal Procedure Act 51 of 1977, section 16(2).

192 Criminal Procedure Act 51 of 1977, section 15.

193 See, e.g. *Phillips v Botha* [1999] 1 All SA 524 (A).

burden of proof is lower and there is the prospect of financial compensation in the form of damages, rather than costs alone. Civil actions may also be brought (instead of or in addition to prosecutions) against the state in cases where damages arise from criminally negligent actions undertaken by state employees in the course of their employment,<sup>194</sup> or for negligence by the state resulting in the commission of offenses.<sup>195</sup>

*Private prosecution by statutory right:* Any body upon which the right to prosecute in respect of any offense is expressly conferred by law, may institute and conduct a prosecution in respect of such offense in any court competent to try that offense.<sup>196</sup>

For example, local government legislation confers on municipalities the authority to prosecute municipal by-laws and other legislation administered by the municipality, by way of delegation of prosecutorial authority from the National Director.<sup>197</sup> These matters are prosecuted by prosecutors employed by the municipality and heard in Municipal Courts, which are magistrates' courts funded by the municipality but presided over by magistrates assigned by the nearest district court.<sup>198</sup> Funds generated by fines processed in these courts, predominantly traffic fines, accrue to the municipality.

The prosecutorial delegation to municipal prosecutors is specifically subject to the control and direction of the National Director or his designate, and the delegation may only be to a *competent* person.<sup>199</sup> In practice, control and direction of municipal prosecutors by the NPA is limited. Municipal prosecutors are instructed and directed on a daily basis by their managers in the municipality.<sup>200</sup> In some jurisdictions, particularly in the case of Municipal Traffic Courts, municipal prosecutors have been appointed from the ranks of traffic officers, bringing their independence and impartiality further into question.<sup>201</sup>

*Control of the investigative pre-trial phase:* In the National Prosecution Service, prosecutors receive case dockets from the police and make a decision whether to prosecute or not, or they refer the matter back to the police for further investigation. Where the matter is referred back to the police, the prosecution usually provides some indication as to what further evidence is required to ensure a prosecution. A matter is generally referred back when it seems likely that the police may be able to obtain such further evidence.

Within the specialized units of the NPA, however, there is much closer control of the investigative pre-trial phase by the prosecution. For example, the Specialized

194 See *Minister of Safety & Security v Luiters* [2006] JOL 16964 (SCA).

195 See *Carmichele v Minister of Safety and Security and Another* (Centre for Applied Legal Studies Intervening) CCT48/00, and *Minister of Safety & Security & another v Carmichele* [2003] JOL 12119 (SCA).

196 Criminal Procedure Act 51 of 1977, section 8(1).

197 Local Government: Municipal Systems Act 32 of 2000, section 112, read with National Prosecuting Authority Act 32 of 1998, section 22(8)(b).

198 M. Lue-Dugmore & J. Redpath, *A Study of Municipal Courts in South Africa: Research Report for the City of Cape Town* (unpublished) August 2006, at 11.

199 National Prosecuting Authority Act 32 of 1998, section 22(8)(b).

200 Lue-Dugmore, M. & Redpath, J., *A Study of Municipal Courts in South Africa: Research Report for the City of Cape Town* (unpublished) August 2006 at 58 et. seq.

201 *Id.*

Commercial Crime Unit makes use of “prosecutor guided” investigations,<sup>202</sup> while the Sexual Offenses and Community Affairs Unit has adopted a “victim-centered, prosecutor-guided, and court-directed approach” to the prosecution of sexual offenses in these courts.<sup>203</sup>

Within the Directorate of Special Operations, prosecutors and investigators work together in teams on every matter, with prosecutors usually leading such team investigations. This is one of the characteristics that have brought the constitutionality of the DSO into question, because of the possible impact on the impartiality of the prosecution.<sup>204</sup> However, the Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations found this argument to be unfounded and determined that the “information gathering powers of the DSO” should not be amended. In June 2006, the Cabinet endorsed the Khampepe Commission’s Findings.<sup>205</sup>

### *Control of On-Going Prosecution*

*Power to request summonses:* The prosecution (or a commissioned officer of the police) has the power to apply to a magistrate for the issuing of a summons for the arrest of an accused who is not in police custody.<sup>206</sup> Where the prosecution intends to prosecute an accused, and the accused is not in custody and no warrant has been or is to be issued for the arrest of the accused for that offense, the prosecutor may secure the attendance of the accused for a summary trial in a lower court having jurisdiction by drawing up the relevant charge and handing such charge, together with relevant contact information of the accused, to the clerk of the court, who must issue a summons.<sup>207</sup> The prosecutor may also request the magistrate to issue a summons to a witness to ensure his appearance at trial.<sup>208</sup> A summons is not a requirement for witnesses to give evidence, however, and witnesses may be informally requested to appear.<sup>209</sup>

*Power to grant or appeal bail:* A DPP or duly authorized prosecutor may, in respect of certain specified offenses<sup>210</sup> and in consultation with the police official charged with the investigation, authorize the release of an accused on bail.<sup>211</sup> For minor offenses, the police may grant bail.<sup>212</sup> For serious offenses, the court must decide on bail. The DPP

202 Annual Report, *supra* note 32, at 46.

203 *Id.* at 44.

204 Redpath, *supra* note 40, at 63-65.

205 Annual Report, 2005/06, *supra* note 32, at 5.

206 Criminal Procedure Act 51 of 1977, section 43(1).

207 Criminal Procedure Act 51 of 1977, section 54(1).

208 Criminal Procedure Act 51 of 1977, section 205(1).

209 *S v Matisonn* 1981 (3) SA 302 (A).

210 For example, culpable homicide, assault involving the infliction of grievous bodily harm, arson, housebreaking, malicious injury to property, robbery other than a robbery with aggravating circumstances and provided the amount involved in the offense does not exceed R20,000, and theft.

211 Criminal Procedure Act 51 of 1977, section 59A.

212 Criminal Procedure Act 51 of 1977, section 59.

may appeal to the superior court having jurisdiction against the decision of a lower court to release an accused on bail or against the imposition of a condition of bail.<sup>213</sup>

*Power to select the court of trial:* The court before whom an accused appears for the purposes of a bail application must refer such accused to a court designated by the prosecutor for purposes of trial.<sup>214</sup> If an accused appears in a magistrate's court and the prosecutor informs the court that the alleged offense merits punishment in excess of the jurisdiction of a magistrate's court, the court must, if so requested by the prosecutor, refer the accused to the regional court for summary trial without the accused having to plead to the relevant charge.<sup>215</sup>

*Power to conclude plea and sentence agreements:* A prosecutor authorized by the National Director and an accused who is legally represented may, before the accused pleads to the charge, negotiate and enter into an agreement in respect of a guilty plea by the accused to the offense charged (or to an offense of which he or she may be convicted on the charge) and a just sentence to be imposed by the court.<sup>216</sup> The court must satisfy itself of the guilt of the accused as well as the justice of the sentence agreement, or determine a sentence it considers to be just.<sup>217</sup> Both the accused and the prosecution then have an opportunity to withdraw from the agreement upon being informed of what the court considers to be a just sentence.<sup>218</sup> If they abide by the agreement, the conviction is passed and the just sentence imposed.<sup>219</sup> If they withdraw, the trial must then proceed *de novo* before another presiding officer, and no reference may be made to the agreement in the trial.<sup>220</sup> During 2005/06, just over 3,000 cases were finalized by way of plea and sentence agreements.<sup>221</sup>

*Powers in relation to assessors:* South Africa abolished the jury system in 1969.<sup>222</sup> However, the presiding judge may in certain cases summon not more than two assessors to assist him at the trial.<sup>223</sup> The selection of assessors is solely the prerogative of the judge. There is no statutory provision for recusal of superior court assessors. However, the superior courts have inherent jurisdiction to entertain an application for recusal of an assessor. Magistrates may also be assisted by assessors in specified cases.<sup>224</sup>

Generally speaking, accused persons prefer to proceed without assessors, because lay persons are perceived to be more punitive than presiding officers. Where a magistrate is assisted by an assessor, both the prosecution and the defense may apply for

213 Criminal Procedure Act 51 of 1977, section 65A.

214 Criminal Procedure Act 51 of 1977, section 75(3).

215 Criminal Procedure Act 51 of 1977, section 75(2)(b).

216 Criminal Procedure Act 51 of 1977, section 105A.

217 Criminal Procedure Act 51 of 1977, section 105A(8) and (9)(a).

218 Criminal Procedure Act 51 of 1977, section 105 (9)(b).

219 Criminal Procedure Act 51 of 1977, section 105(9)(c).

220 Criminal Procedure Act 51 of 1977, section 105(9)(d).

221 J. H. T. Schutte, "Plea agreements 05/06" (undated), NPA spreadsheet obtained via email communication, May 26, 2006, (no page numbers).

222 Abolition of Juries Act 34 of 1969.

223 Criminal Procedure Act 51 of 1977, section 145.

224 Magistrates Courts Act 32 of 1944, section 93 *ter*.



the recusal of an assessor where her impartiality is in question and address arguments to the magistrate on the desirability of the recusal.<sup>225</sup>

*Powers in trial:* The prosecutor may at trial, before any evidence is adduced, address the court for the purpose of explaining the charge and indicating, without comment, to the court what evidence he intends to adduce in support of the charge.<sup>226</sup> The prosecutor may then examine the witnesses for the prosecution and adduce such evidence as may be admissible to prove that the accused committed the offense referred to in the charge.<sup>227</sup> After all the evidence has been adduced, the prosecutor may address the court, and thereafter the accused may address the court.<sup>228</sup> The prosecutor may reply on any matter of law raised by the accused in his address, and may, with leave of the court, reply on any matter of fact raised by the accused in his address.<sup>229</sup>

*Post-trial functions:* A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. The accused may address the court on any evidence received as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.<sup>230</sup> Prosecutorial policy provides that prosecutors must ensure that the court is informed of the existence of aggravating circumstances and, where an accused is undefended, mitigating factors.<sup>231</sup> In cases involving crimes of a serious nature, including violent crimes and sexual offenses against women and children, the prosecution is supposed to provide evidence relating to the impact of the crime on the victim and the community, statistics regarding the frequency and relative seriousness of the offense, and any relevant previous convictions the accused might have.<sup>232</sup> The judge, who generally has a wide range of sentencing options to choose from, is not obliged to take heed of the suggestions made by either the prosecution or the defense, however.<sup>233</sup>

The NPA has representation on the Correctional Supervision and Parole Review Board (CSPR Board).<sup>234</sup> The CSPR Board takes decisions by majority vote and has the power to confirm decisions of the Correctional Supervision and Parole Board or to substitute a decision of its own.<sup>235</sup> The Correctional Supervision and Parole Board makes decisions regarding granting or cancellation of correctional supervision, parole, or day parole,<sup>236</sup> and its decisions are final and can only be referred to the CSPR Board by the Minister or Commissioner of Correctional Services.<sup>237</sup>

225 Magistrates Courts Act 32 of 1944, section 93 *ter* (10) (a) and (c).

226 Criminal Procedure Act 51 of 1977, section 150(1).

227 Criminal Procedure Act 51 of 1977, section 150(2)(a).

228 Criminal Procedure Act 51 of 1977, section 175(1).

229 Criminal Procedure Act 51 of 1977, section 175(1).

230 Criminal Procedure Act 51 of 1977, section 274.

231 *National Prosecuting Authority of South Africa Policy Manual*, *supra* note 118, at B.61, 63.

232 *Id.* at B.61-62.

233 See Martin Schönteich, "Sentencing in South Africa. Public perception and the judicial process," ISS Papers, Paper 43, Pretoria: Institute for Security Studies (November 1999), at 13-17 (discussing the more commonly used sentencing options).

234 Correctional Services Act 111 of 1998, section 76.

235 Correctional Services Act 111 of 1998, section 77.

236 Correctional Services Act 111 of 1998, section 75.

237 Correctional Services Act 111 of 1998, section 75(8).

### 3.2. Relationship with the judge at the pre-trial stage

*Pre-trial and investigatory detention:* The Constitution's Bill of Rights assures the rights of those held in detention by providing that anyone arrested on suspicion of committing an offense must be brought before a court within 48 hours,<sup>238</sup> and has the right to be released if the interests of justice so permit.<sup>239</sup> Legislation also provides that an accused must be brought before a court within 48 hours. Bail applications may be postponed by the court for a period of no more than seven days at a time.<sup>240</sup> The right to legal representation<sup>241</sup> and to receive visits<sup>242</sup> is also guaranteed for all detained persons, including sentenced prisoners, in the Bill of Rights. The right to silence is guaranteed<sup>243</sup> and no one arrested may be compelled to make a confession,<sup>244</sup> even during a state of emergency.<sup>245</sup>

The 48-hour rule has come under pressure on a number of occasions. For example, in late 2006, the Minister for Safety and Security, Charles Nqakula, appeared before the Safety and Security Committee of Parliament to argue that 48 hours was not long enough for police to gather sufficient evidence for the state successfully to oppose a bail application.<sup>246</sup>

Legal provisions regarding bail applications have changed frequently since 1994, during 1995,<sup>247</sup> 1997,<sup>248</sup> 1998<sup>249</sup> and 2000,<sup>250</sup> possibly reflecting the state's continued struggle to combat crime within a human rights framework. Generally speaking, the amendments have progressively moved toward making it more difficult for an accused to be granted bail. Some analysts argue this is a response to negative publicity around crimes committed by accused persons who had previously been released on bail, coupled with perceptions of a lack of experience among prosecutors.

For example, prior to the 2000 amendment, a person accused of a less serious offense<sup>251</sup> was entitled to be released on bail at any stage of proceedings "unless the court finds that it is in the interests of justice that he or she be detained in custody."<sup>252</sup>

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238 Constitution of the Republic of South Africa Act 108 of 1996, section 35(1)(d).

239 Constitution of the Republic of South Africa Act 108 of 1996, section 35(1)(f).

240 Criminal Procedure Act 51 of 1977, section 50(6)(d).

241 Constitution of the Republic of South Africa Act 108 of 1996, section 35(2)(b)&(c).

242 Constitution of the Republic of South Africa Act 108 of 1996, section 35(2)(f).

243 Constitution of the Republic of South Africa Act 108 of 1996, section 35(1)(a).

244 Constitution of the Republic of South Africa Act 108 of 1996, section 35(1)(c).

245 Constitution of the Republic of South Africa Act 108 of 1996, section 37(5), Table of Non-Derogable Rights.

246 (No author) SABC News, November 1, 2006, 15h15, <http://www.sabcnews.com/politics/government/0,2172,137670,00.html> (accessed July 15, 2007).

247 Criminal Procedure Second Amendment Act 75 of 1995.

248 Criminal Procedure Second Amendment Act 85 of 1997.

249 Judicial Matters Amendment Act 34 of 1998.

250 Judicial Matters Amendment Act 62 of 2000.

251 That is, an offense not listed in Schedule 5 or 6 of the Criminal Procedure Act 51 of 1977.

252 Criminal Procedure Act 51 of 1977, section 60(1)(a), prior to amendment by the Judicial Matters Amendment Act 62 of 2000.

Now, the accused is only “entitled to be released on bail at any stage preceding his or her conviction in respect of such offense, if the court is satisfied that the interests of justice so permit.”<sup>253</sup> Consequently, there must be evidence adduced that it is in the interests of justice that the accused must be released.

For the most serious offenses,<sup>254</sup> unless “exceptional circumstances” exist which satisfy the court that it is in the interests of justice to grant bail, the accused must be retained in custody.<sup>255</sup> For other serious offenses,<sup>256</sup> the accused must be detained in custody unless the accused adduces evidence which satisfies the court that the interests of justice permit his or her release.<sup>257</sup> The burden of proof is thus on the accused to establish that his or her release is in the interests of justice.<sup>258</sup>

Given the problem of overcrowding in prisons in South Africa, prosecutorial policy encourages prosecutors to consider carefully whether bail is in the interests of justice in each case.<sup>259</sup> While the ultimate decision on whether to grant bail is the judicial officer’s—“the grant or refusal of bail is unmistakably a judicial function”<sup>260</sup>—they are in practice strongly influenced by the prosecutor’s recommendation. However, judicial officers are “expressly not to act as a passive umpire”<sup>261</sup> in bail applications, but must adopt an inquisitorial approach.

Prosecutors must continuously reassess the state’s attitude to bail in respect of an accused in custody awaiting trial. If an accused has been in custody for longer than three months, prosecutors must specifically raise the issue at each court appearance and ask the court to record the reasons for the further detention.<sup>262</sup>

*The preparatory examination:* The DPP may direct that a trial in a superior court be preceded by a preparatory examination in a magistrates’ court (or that a trial be converted into a preparatory examination) if he is of the opinion that it is in the interests of justice to do so.<sup>263</sup> A preparatory examination is not a trial, but an examination held before a magistrate to determine whether the evidence justifies a trial before a court.<sup>264</sup> The accused does not plead at the commencement of the examination, but at its conclusion.<sup>265</sup> After considering the record of a preparatory examination, the DPP

253 Criminal Procedure Act, 51 of 1977, section 60(1)(a) as amended.

254 Offenses listed in Schedule 6 of the Criminal Procedure Act, 51 of 1977 as amended, including, *inter alia*, certain aggravated forms of murder, rape, and robbery.

255 Criminal Procedure Act 51 of 1977, as amended, section 60(11)(a).

256 Offenses listed in Schedule 5 of the Criminal Procedure Act 51 of 1977, as amended, including treason and forms of murder, attempted murder, and rape and a number of drug and corruption-related offenses.

257 Criminal Procedure Act 51 of 1977 as amended, section 60(11)(b).

258 See *Verwey & others v S* [2006] JOL 17220 (W), at para 9.

259 (No publisher) National Prosecuting Authority, *NPA Awaiting Trial Detainee Guidelines* (undated), at 19, [http://www.npa.gov.za/UploadedFiles/ATD%20Guidelines%20\(3c\)%20doc%20final.pdf](http://www.npa.gov.za/UploadedFiles/ATD%20Guidelines%20(3c)%20doc%20final.pdf) (accessed 26 June 2007).

260 See *Dlamini v S; Dladla and others v S; S v Joubert; S v Schietekat* [1999] JOL 4944 (CC) at para 10.

261 See *Dlamini v S; Dladla and others v S; S v Joubert; S v Schietekat* [1999] JOL 4944 (CC) at para 10.

262 *National Prosecuting Authority of South Africa Policy Manual*, *supra* note 118, at B.16 – B.21.

263 Criminal Procedure Act 52 of 1977, section 123(1).

264 Geldenhuys & Joubert, et. al., *Criminal Procedure Handbook*, *supra* note 152, at 132.

265 *Id.* at 132.

may (a) in respect of any charge to which the accused has pleaded guilty, arraign the accused for sentence before any court having jurisdiction, (b) arraign the accused for trial before any court having jurisdiction, whether the accused has pleaded guilty or not guilty to any charge and whether or not he has been discharged by the magistrate, (c) decline to prosecute the accused, and advise the lower court concerned of his decision.<sup>266</sup>

*Other surveillance warrants:* Any law enforcement officer, official of the state or any other person authorized for such a purpose may make use of a trap or engage in an undercover operation in order to detect, investigate, or uncover the commission of an offense, or to prevent the commission of any offense.<sup>267</sup> However, the evidence so obtained is admissible in court only if that conduct does not go beyond providing an opportunity to commit an offense.<sup>268</sup> Even where the conduct does go beyond providing the opportunity for committing an offense, a court may nevertheless admit the evidence obtained if it is in the public interest.<sup>269</sup> The burden of proof with regard to admissibility rests with the prosecution, but the accused must raise grounds to challenge admissibility. If the accused is not represented, the court must raise the question of admissibility.<sup>270</sup>

### **3.3. Powers outside the criminal justice system**

The National Director, usually in the form of the Asset Forfeiture Unit, has the power to institute civil proceedings for the forfeiture of assets in the High Courts.<sup>271</sup> Although no person need be found guilty of a criminal offense, proof is required that the property being targeted is either an instrumentality of an offense, the proceeds of unlawful activities, or associated with terrorist activities.<sup>272</sup> All other civil proceedings on behalf of the state are usually instituted or defended by the State Attorney's Office.<sup>273</sup>

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266 Criminal Procedure Act 51 of 1977, section 139.

267 Criminal Procedure Act 51 of 1977, section 252A(1).

268 Criminal Procedure Act 51 of 1977, section 252A(1).

269 Criminal Procedure Act 51 of 1977, section 252A(1) read with Section 252A(3)(b).

270 Criminal Procedure Act 51 of 1977, section 252A(6).

271 Prevention of Organized Crime Act 121 of 1998, section 37 and 38(1).

272 Prevention of Organized Crime Act 121 of 1998, section 38(2).

273 State Attorney Act 56 of 1957, section 3.

## IV. Relationship of the Prosecution Service to Other Organs of the State

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### 4.1. Political developments affecting the NPA

The NPA appears to have become embroiled in political battles for power within the ANC, broadly put, between the neo-liberal camp represented by President (and president of the ruling ANC) Thabo Mbeki, and the populist camp, led by Deputy ANC President Jacob Zuma.

In 1998, when the first National Director, Bulelani Ngcuka, was appointed by President Mbeki, commentators were concerned about his strong ANC links. Questions were raised as to whether high-profile ANC members would receive “special treatment” at the hands of the prosecution.<sup>274</sup> Indeed, in 1998, the National Director intervened in favor of three convicted ANC appellants in a bail application pending their appeal. Their appeal was successful, appearing to vindicate his position.<sup>275</sup> However, prosecutions of two senior ANC politicians, MP Winnie Madikizela-Mandela and party chief whip Tony Yengeni, both culminating in 2003, proceeded unhindered.<sup>276</sup>

In 2000, the DSO unit of the NPA began a corruption investigation into a multi-billion Rand arms procurement package concluded by the South African government in 1999. In July 2003 it transpired that South Africa’s then-Deputy President Jacob Zuma was a suspect in this matter. In August 2003, the National Director announced that despite the existence of a *prima facie* case against the Deputy President, the NPA would not prosecute.<sup>277</sup> The case against Schabir Shaik, the arms deal businessman alleged to have had a corrupt relationship with Zuma, was to proceed, however.

In September 2003, allegations that the National Director was an apartheid-era spy emerged, apparently from the Zuma camp. President Mbeki responded by appointing the Hefer Commission of Inquiry to investigate whether the National Director had in fact been a spy and whether he had misused the NPA as a result.<sup>278</sup> The Hefer Commission found no evidence that the National Director had been a spy. Given this finding, Judge Hefer felt that the question of whether the National Director had misused the NPA fell away.<sup>279</sup>

The prosecution against Shaik continued, initially with Ngcuka as National Director. However, in July 2004 the National Director announced his decision to resign, citing

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274 Redpath, *supra* note 40, at 69.

275 *Id.*

276 *Id.*

277 C. Johnson, “Zuma not to be prosecuted,” *The Mercury*, 27 August 2003.

278 Judge J Hefer, *Hefer Commission of Inquiry Report*, January 7, 2004, at para 2. Available on <http://www.iss.co.za/CJM/pdf/heferreport.pdf> (accessed July 10, 2007).

279 *Id.* at para 88.

personal reasons. In June 2005, Schabir Shaik was convicted, and shortly thereafter President Mbeki announced that Deputy President Jacob Zuma would be relieved of his government duties because of the latter's relationship with Shaik, as found in the judgment.<sup>280</sup> Zuma would, however, remain Deputy President of the ANC (Update: in December 2007 Zuma was chosen as the ANC Party President).

Not long thereafter, the NPA announced it would prosecute Zuma on two counts of corruption, with the trial to begin in July 2006. However, in September 2006 the High Court refused the prosecutions' request for a further postponement and struck the matter from the roll. The NPA maintained it would still bring the matter to trial once the various issues delaying the trial had been resolved.

In December 2006, following three weeks of investigations, Zuma was charged with the rape of a prominent HIV/Aids activist in his home. Zuma voluntarily suspended his participation in ANC party structures until the resolution of the trial. In May 2007 Zuma was acquitted, the court finding that consensual sex had taken place.<sup>281</sup> Zuma then resumed his activities as Deputy President of the ANC. Zuma's corruption trial remains pending.

In April 2005, President Mbeki appointed a Judicial Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations (the Khampepe Commission).<sup>282</sup> This was done to resolve tensions which had developed between the police and the DSO, with the police claiming the DSO should form part of the police. In July 2005, the Khampepe Commission submitted an interim report to the President, the findings of which were only publicized in June 2006.<sup>283</sup> The Commission recommended that the DSO be retained within the NPA, but that political oversight and responsibility for the law enforcement component of the DSO should be conferred on the Minister for Safety and Security. The Cabinet elected to accept the recommendations.

In July 2007, the ANC policy chief, Jeff Radebe, told an ANC policy conference that the DSO, South Africa's municipal police forces, and the provincial traffic police must be brought under the control of the South African Police Services—despite the contrary findings of the Khampepe Commission, published almost a year earlier.<sup>284</sup> The issue of the DSO being brought under the police may have emerged again because press reports emerged in October 2006 that the DSO was investigating crimi-

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280 (No author) "Statement of the President of South Africa, Thabo Mbeki, at the Joint Sitting of Parliament on the Release of Hon Jacob Zuma from his Responsibilities as Deputy President: National Assembly," SA government website, June 14, 2005, <http://www.dfa.gov.za/docs/speeches/2005/mbek0614.htm>

281 *S v Zuma* [2006] JOL 17305 (W).

282 (No author) "Statement on the Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations – Khampepe Commission," SA government website, July 25, 2005, <http://www.info.gov.za/speeches/2005/05072614451001.htm> (accessed July 9, 2007).

283 (No author) "Statement on the Report of the Khampepe Commission of Inquiry," *South African Government Information*, June 29, 2006 <http://www.info.gov.za/speeches/2006/06062915451001.htm> (accessed July 20, 2007).

284 Paddy Harper, "All-in-one plan for police," *Sunday Times*, July 1, 2007, <http://www.suntimes.co.za/article.aspx?ID=505777> (accessed July 9, 2007).



nal allegations against the National Commissioner of Police and other senior police officers,<sup>285</sup> and that the Commissioner was closely linked with the “landlord of a huge smuggling syndicate.”<sup>286</sup>

In January 2006, special policy directives for the prosecution of apartheid-era political criminals were adopted, bringing an end to a moratorium on prosecutions, which had been prompted by ANC concerns about a clear policy on such prosecutions after an ANC member who failed to apply for amnesty was successfully prosecuted in 2004.<sup>287</sup> While making provision for special plea and sentencing agreements with the state, the NPA maintained the directives did not amount to an amnesty process for perpetrators. Rather, it provided that perpetrators could approach the NPA with information on crimes committed prior to May 11, 1994 in the form of a sworn affidavit and become state witnesses in resulting trials, provided a full disclosure was made.<sup>288</sup>

Any decision not to prosecute such a matter, and the reasons therefore, must be made public and reported to the Minister of Justice. Individuals not prosecuted by the state could still face civil action. Prosecutions could arise from victim complaints as well as ongoing investigations into cases arising from the TRC hearings. In July 2007, the NPA announced that the former apartheid Minister of Law and Order, Adriaan Vlok, was to be prosecuted for plotting to kill a prominent anti-apartheid activist.

#### 4.2. Relationship with the legislature

South Africa’s Parliament is in general perceived to be weak, largely because the most senior politicians in the ruling party tend to be deployed to executive positions. Consequently, more junior ruling party politicians who are Members of Parliament, and who comprise roughly two thirds of Parliament, appear to find the exercise of strong oversight over the executive fraught with difficulty. Nevertheless, the NPA is accountable to Parliament in respect of its powers, functions, and duties, including decisions regarding the institution of prosecutions.<sup>289</sup> The National Assembly does not, however, directly appoint prosecutors, control their career paths, or advise the Minister and the NPA on appointments.

*Oversight:* The National Assembly’s Portfolio Committee on Justice and Constitutional Development has primary responsibility for overseeing the activities of the NPA.<sup>290</sup> The committee can summon any person to appear before it to give evidence

285 Wisani wa ka Ngobeni, Dominic Mahlangu and Dumisane Lubisi “Scorpions spied on Selebi,” *Sunday Times*, October 29, 2006 (<http://www.suntimes.co.za/article.aspx?ID=305138> (accessed July 9, 2007).

286 Simphiwe Piliso, Jocelyn Maker and Jessica Bezuidenhout, “Selebi named in explosive diary,” *Sunday Times* <http://www.suntimes.co.za/article.aspx?ID=316074> (accessed July 9, 2007).

287 SAPA, “Prosecution Policy unveiled for apartheid-era crime,” *Mail & Guardian*, January 17, 2006, at 4.

288 SAPA, “Prosecution Policy unveiled for apartheid-era crime,” *Mail & Guardian*, January 17, 2006, at 4.

289 National Prosecuting Authority Act 32 of 1998, section 35(1).

290 Constitution of the Republic of South Africa Act 108 of 1996, section 56. The National Assembly appoints a number of portfolio committees from among its members to monitor the work of Government departments. Portfolio committees consider draft legislation, deal with departmental budget votes, oversee the work of the department, and enquire and make recommendations about



under oath or produce documents; require any person or institution to report to it; or receive petitions, representations or submissions from any interested persons or institutions. Other committees also have oversight responsibility over the NPA, depending upon the subject matter. For example, the Safety and Security committee has oversight in relation to the operation and effectiveness of joint task teams consisting of members of the police and prosecution service.

Despite their strong mandate, however, committees differ in their effectiveness as overseers of the executive's actions. The role each committee plays is strongly linked to how active its chairperson is, and there is no common understanding among Members of Parliament about the role and powers of committees.<sup>291</sup> Moreover, many parliamentary committees are burdened with reviewing draft legislation and holding public hearings and submissions on legislative proposals. This is especially true for the Portfolio Committee of Justice and Constitutional Development, which has had one of the heaviest loads of new legislation since 1994.

*Other legislative influence—legislated performance goals:* Parliament has the power to hold the executive accountable legislatively, by requiring public accountability for funding and performance, and by reinforcing the distinction between the responsibility of a Minister for policy and outcomes, and of the head of the government department—the “accounting officer” (the actual term used in the legislation to refer to the responsible officer)—for implementing the policy and achieving defined outputs.<sup>292</sup> The employment contract of each accounting officer incorporates these performance standards.<sup>293</sup>

In 2001, the NPA moved to a separate financial management system and appointed a Chief Executive Officer as its accounting officer. Accounting officers are obliged to meet outputs against a range of predetermined indicators. In this way, departments “must be specific about what is intended to be, and has actually been, delivered.”<sup>294</sup> In particular, accounting officers are responsible for developing three-year strategic plans that run concurrently with a department's Medium Term Expenditure Framework, and one-year operational plans. These plans must provide a detailed quantification of resources, outputs, and indicators, so that Parliament can understand “exactly what it is ‘buying’ for the community when it approves the budget.”<sup>295</sup>

Accounting officers have to report monthly (to the Minister and Treasury), quarterly (Treasury) and yearly (via Annual Report to the Treasury and the Minister).<sup>296</sup> Both these reports and the monthly reports are publicly available.<sup>297</sup> The Annual Report

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the department's structure, functioning and policy. Committees may also investigate any matter of public interest within their responsibility.

291 R. Calland (ed.), *The First 5 Years. A Review of South Africa's Democratic Parliament*, Cape Town: Idasa (1999), at 31.

292 Public Finance Management Act 1 of 1999, section 1 and 36.

293 (No author) *Guide for Accounting Officers. Public Finance Management Act*: National Treasury (October 2000), at 26.

294 *Id.* at 8.

295 *Id.* at 8.

296 *Id.* at 21.

297 According to guidelines drawn up by the National Treasury for accounting officers, accountabil-

must review performance and achievements against the operational plan and budget,<sup>298</sup> and should also “indicate the department’s efficiency, economy and effectiveness in delivering the outputs specified in the operational plan, as well as any other information required by the legislature.”<sup>299</sup> The National Assembly’s Standing Committee on Public Accounts also reviews this report,<sup>300</sup> after which it is made available to the public.

While the use of legislated performance goals creates the environment for more effective oversight, limited capacity among Members of Parliament and their staff has meant that these roles are not always effectively fulfilled; committee members and research staff often fail to understand their roles and the issues they oversee and have limited capacity to draft reports or track recommendations made to Government officials.<sup>301</sup>

### 4.3. Relationship with the executive

The Minister of Justice and the President have considerable influence over the composition and general policy of the NPA. However, the decision to prosecute particular cases rests solely with the National Director and the NPA, although the Minister may require the National Director to provide reasons for any decisions.<sup>302</sup>

*The Minister of Justice:* The Minister is “responsible for the administration of justice [and] must exercise final responsibility over the prosecuting authority.”<sup>303</sup> The National Director determines prosecution policy and appoints senior NPA staff only with the concurrence of the Minister, and has extensive obligations to inform and consult with the Minister.<sup>304</sup>

The Minister holds regular meetings with the National Director to discuss particular high profile cases and general prosecution policies. These structured meetings take place on a weekly basis, and the National Director also provides the Minister with regular written reports on specific cases. The National Director also arranges meetings between the Minister and members of the NPA at the Minister’s request.<sup>305</sup>

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ity officers “should expect the press, parliamentary committees, non-governmental organizations (NGOs) and the public to monitor their department’s progress through these reports.” *Guide for Accounting Officers. Public Finance Management Act*, *supra* note 293, at 21.

298 Public Finance Management Act 1 of 1999, section 40(3)(a).

299 *Guide for Accounting Officers. Public Finance Management Act*, National Treasury (October 2000), *supra* note 293, at 21.

300 The National Assembly’s Standing Committee on Public Accounts is responsible for overseeing public expenditure of all government departments. It can investigate irregularities and can call parties involved before it to account for and explain their actions.

301 (No author) “The Parliamentary Centre in Southern Africa, Legislative Accountability Program,” Parliamentary Centre Website (no page numbers), [http://www.parlcent.ca/africa/southernafrika\\_e.php](http://www.parlcent.ca/africa/southernafrika_e.php), (accessed June 3, 2004).

302 National Prosecuting Authority Act 32 of 1998, section 33(2)(b).

303 Constitution of the Republic of South Africa Act 108 of 1996, section 179(6).

304 Constitution of the Republic of South Africa Act 108 of 1996, section 179(5).

305 For example, the Minister requested detailed briefings from the National Director on the debate

At the request of the Minister, the National Director is obliged to furnish the Minister with information concerning prosecution policy, prosecutorial policy directives, and any particular case or matter dealt with by the NPA at the Minister's request.<sup>306</sup> The National Director must provide the Minister with reasons for decisions taken by Directors. These can include reasons relating to the success or failure of a particular case and decisions about appealing cases. The National Director must submit to the Minister annual reports provided to the National Director by the Directors on the latter's activities during the previous year.<sup>307</sup>

The Minister also chairs a broader Ministerial Coordinating Committee<sup>308</sup> that determines policy guidelines and specific responsibilities for the DSO as well as procedures to coordinate the Directorate's work with other executive bodies such as the police.<sup>309</sup> However, the Committee has met infrequently since the creation of the DSO in 1999.

The Minister may, after consultation with the National Director, appoint Deputy Directors of Public Prosecutions to the NPA office at the seat of each High Court and in the office of the National Director. Directors and Deputy Directors of Public Prosecutions appointed to the office of the National Director are normally assigned to specific portfolios or projects, including legislation development and drafting, international cooperation and treaty affairs, and legal and strategy advice.

Other than the functions highlighted above, in practice the Minister of Justice does not engage extensively in the day-to-day management and running of the NPA. The Minister may on occasion request that various units in the NPA write legal opinions on high profile or contentious topics or cases, but this does not happen regularly. The Minister is also required to approve all international traveling arrangements of NPA staff, including the National Director.

*The President:* The President makes a number of appointments affecting the NPA. The President appoints the National Director,<sup>310</sup> and, upon the nomination of the National Director and after consulting with the Minister of Justice, also appoints up to four Deputy National Directors of Public Prosecutions.<sup>311</sup> To date, all candidates recommended by the National Director have been appointed.

After consultation with the Minister and the National Director, the President may also appoint (on the recommendation of the National Director) a Director of Public

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surrounding the institutional placement of the DSO prior to the Khampepe Commission.

306 National Prosecuting Authority Act 32 of 1998, section 33(2)(a)-(f).

307 Section 34 read with section 33(2)(e), National Prosecuting Authority Act 32 of 1998.

308 National Prosecuting Authority Act 32 of 1998, section 31(2)(a)(i). The Committee is comprised of cabinet members responsible for justice and constitutional development, safety and security, correctional services, intelligence services, defense, and other cabinet members the President may designate. Section 31(2), National Prosecuting Authority Act 32 of 1998.

309 National Prosecuting Authority Act 32 of 1998, section 31(1).

310 Constitution of the Republic of South Africa Act 108 of 1996, section 179(1)(a), read with National Prosecuting Authority Act 32 of 1998 (as amended), section 10.

311 National Prosecuting Authority Act 32 of 1998, section 11(1) and 13(1)(a).

Prosecutions at the seat of each High Court,<sup>312</sup> as well as one or more Directors of Public Prosecutions to the Directorate of Special Operations.<sup>313</sup>

The President may by proclamation establish up to two additional Investigating Directorates within the Office of the National Director, regarding matters not contemplated for the Directorate of Special Operations.<sup>314</sup> The President may only issue such a proclamation on the recommendation of the Minister and National Director, and must also submit the proclamation to Parliament before publication, but Parliament cannot veto it.<sup>315</sup> The President then appoints a Director to head the new Investigating Directorate, again after consultation with the Minister and the National Director.<sup>316</sup>

Finally, the President may, after consultation with the Minister and the National Director, appoint one or more Directors as “Special Directors” with special portfolios within the NPA.<sup>317</sup> To date, the President has appointed six Special Directors, all based at the head office and reporting directly to the National Director.

In addition, the President has indirect influence over DSO within the National Prosecuting Authority through his power to appoint the Minister of Justice and Constitutional Development and the other Ministers on the Ministerial Coordinating Committee.<sup>318</sup> However, given the continued infrequent meetings of this committee, this influence is likely to be minor.

#### 4.4. Relationship with the police

It is possible for members of the public to report suspected crimes directly to an Investigating Director of the NPA.<sup>319</sup> This, however, occurs extremely rarely, and virtually all crimes are reported to the police. There is a single national police agency, the South African Police Service (SAPS), whose constitutional mandate is “to prevent, combat and investigate crimes, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.”<sup>320</sup>

All police officers have investigative powers,<sup>321</sup> and there is a dedicated Detective Service of the SAPS with responsibility for investigating crime.<sup>322</sup> In 2004, the police

312 National Prosecuting Authority Act 32 of 1998, section 11(1) and 13(1)(a).

313 National Prosecuting Authority Act 32 of 1998, section 13(1)(aA).

314 National Prosecuting Authority Act 32 of 1998, section 7(1A).

315 National Prosecuting Authority Act 32 of 1998, section 7(2).

316 National Prosecuting Authority Act 32 of 1998, section 13(1)(b).

317 National Prosecuting Authority Act 32 of 1998, section 13(1)(c).

318 Constitution of the Republic of South Africa Act 108 of 1996, section 91(2).

319 National Prosecuting Authority Act 32 of 1998, section 27.

320 Constitution of the Republic of South Africa Act 108 of 1996, section 205(3). *See also* South African Police Service Act 68 of 1995, section 5 read with Constitution of the Republic of South Africa Act 200 of 1993, section 214.

321 South African Police Service Act 68 of 1995, section 13(1)-(13).

322 “Top Structure National Level: SA Police Service,” SAPS annual report 2003/04, <http://www.saps.gov.za/profile/struct.htm#struct2> (accessed June 7, 2004).

employed some 28,000 detectives out of a total force (including civilians) of approximately 124,000.<sup>323</sup> The Organized Crime and Commercial Crime Units in the SAPS has a staff compliment of approximately 1,300 detectives. The DSO of the NPA, by comparison, is much smaller, with a total staff of less than 600, including investigators, analysts, and prosecutors.

The police thus initiate most criminal inquiries. However, for a case to enter the police records, two things must happen. First, the complainant must report the incident to the police. Second, the police must actually record the case and open a docket. Inappropriate exercise of the latter discretion has been found to be a strong factor in case attrition, particularly in relation to allegations of sexual offenses.<sup>324</sup>

The SAPS has limited discretion to withdraw or terminate criminal cases (as “undetected—suspect identity unknown”; “undetected—complainant not traced” or “no consequence”) once they have been initiated.<sup>325</sup> They may only withdraw relatively minor cases. Once the police open a formal investigation into a *serious* offense, they may only close the investigation as being of “no consequence” on receipt of an affidavit from the complainant requesting withdrawal.<sup>326</sup> Once the matter has been referred to court, the prosecutor has discretion to prosecute or not, and the matter no longer lies with the police.

The NPA and the police are administratively and institutionally autonomous. The head of the police is the National Commissioner of Police, appointed by the President.<sup>327</sup> The National Commissioner is broadly responsible for policing at the national level,<sup>328</sup> in accordance with constitutional provisions, national policing policy, and the directions of the Minister for Safety and Security.<sup>329</sup> The National Commissioner appoints Provincial Commissioners,<sup>330</sup> who are responsible for day-to-day policing, including the investigation and prevention of crime and maintenance of police stations.<sup>331</sup> The Minister determines national policing policy, after consultation with the provincial governments and taking into account the “policing needs and priorities of the provinces.”<sup>332</sup>

The NPA has no formal influence over policy formation, investigative strategies, or personnel policies for the police. Similarly, the police have no formal influence over the NPA. However, at the ministerial level, their respective ministers are members of

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323 (No author) *2004 Estimates of National Expenditure, Safety and Security*, Vote 25, National Treasury, February 2004, Pretoria, at 690.

324 See L. Artz & D. Smythe, “Case Attrition in Rape Cases: A Comparative Analysis,” *South African Journal of Criminal Justice*, August 2007 (forthcoming).

325 SAPS Standing Orders G325 quoted in Artz, & Smythe, *Id.*

326 Artz & Smythe, *Id.*

327 Constitution of the Republic of South Africa Act 108 of 1996, section 207(1).

328 See section 11 South African Police Service Act 68 of 1995, read with section 218 Constitution of the Republic of South Africa Act 200 of 1993.

329 Constitution of the Republic of South Africa Act 108 of 1996, section 207(2).

330 South African Police Service Act 68 of 1995, section 6, read with Constitution of the Republic of South Africa Act 200 of 1993, section 218(1)(b).

331 See South African Police Service Act 68 of 1995, section 12 read with Constitution of the Republic of South Africa Act 200 of 1993, section 219.

332 Constitution of the Republic of South Africa Act 108 of 1996, section 206(1).

the same ministerial “cluster” (the criminal justice cluster) designed to co-ordinate and synchronize policy developments among associated government departments; consequently, there may be indirect influence exerted through the cluster mechanism.

The functional roles and duties of the police and NPA are likewise largely separate,<sup>333</sup> although the NPA may in certain circumstances direct the activities of the police. In the usual course, the police initiate and conduct criminal investigations.<sup>334</sup> When their investigations are complete, the police hand their findings in the form of a police docket to a prosecutor. Prosecutors are therefore not ordinarily involved in investigations, unless they are members of one of the NPA’s specialized businesses units that engage in prosecution-led investigation, although they may request the police to investigate certain aspects of a crime, or focus their investigations on specific issues in a case, with a view to securing a conviction.

Prosecutors may instruct police officers to carry out further investigation required for the successful prosecution of the case.<sup>335</sup> However, it is not clear whether police are obliged to comply with the prosecutor’s instructions. As with most interdepartmental relationships, compliance with instructions of this nature will be largely volitional. However, the prosecutor normally has direct access to complain to the investigating officer’s supervisor if instructions are not complied with. For egregious cases, the prosecutor can file a formal disciplinary complaint to the Provincial Police Commissioner about the police member’s dereliction of duty, or charge him with obstructing justice.

The NPA’s internal policy notes that “in major or very complex investigations, such an involvement may occur at an early stage and be of a fairly continuous nature. If necessary, specific instructions should be issued to the police with which they must comply.”<sup>336</sup> The NPA policy also states that, “in practice, prosecutors sometimes refer complaints of criminal conduct to the police for investigation. In such instances, they will supervise, direct and co-ordinate criminal investigations.”<sup>337</sup> Such cases may enjoy higher prioritization than cases initiated by member of the public.

Directors of NPA offices at the seat of a High Court may “give written directions or furnish guidelines” to the Provincial Commissioner of Police<sup>338</sup> or any police officer conducting investigations into offenses in the Director’s area of jurisdiction,<sup>339</sup> and can “supervise, direct and co-ordinate specific investigations” by the police in their area.<sup>340</sup> Subject to the directions of the National Director, such directions and guidelines may be given only in relation to particular cases.<sup>341</sup> In most provinces, the

333 This is in part a consequence of the English legal tradition that prevails in the country.

334 “[The] decision to start an investigation into possible or alleged criminal conduct ordinarily rests with the police. The NPA is usually not involved in such decisions although it may be called upon to provide legal advice.” *supra* note 163, *Prosecution Policy*, at A10.

335 National Prosecuting Authority Act 32 of 1998, section 34(2).

336 *Prosecution Policy*, *supra* note 163, at A10.

337 *Id.* at A10.

338 There are nine Provincial Commissioners of Police, one for each of the country’s provinces.

339 National Prosecuting Authority Act 32 of 1998, section 24(4)(c).

340 National Prosecuting Authority Act 32 of 1998, section 24(1)(c).

341 National Prosecuting Authority Act 32 of 1998, section 24(5).



Director and the Provincial Commissioner of Police meet on a monthly basis to discuss important cases and recent criminal developments and trends, and to share general information relevant to policing and prosecution. In practice, Directors generally avoid giving direct instructions to the Provincial Commissioners, and decisions are mostly taken jointly.

*The Investigative Directorates:* The NPA has its own separate investigative capability. The Directorate of Special Operations has authority to “investigate, and to carry out any functions incidental to investigations” relating to organized crime or any other category of crime the President proclaims.<sup>342</sup>

“Special Investigators” appointed to the DSO have the same criminal procedure powers as police officials concerning the investigation of offenses, the entry and search of premises, the seizure and disposal of articles, arrests, and the execution of warrants.<sup>343</sup> However, they do not have the power to conduct road blocks or cordon off a scene.<sup>344</sup> On the other hand, DSO investigators have slightly wider powers than SAPS members once designated to investigate a matter by the Investigating Director of the DSO.<sup>345</sup> These include somewhat extended powers of search and seizure.<sup>346</sup>

Investigating Directorates have considerable powers. An Investigating Director (the head of the Directorate) may summon any person and question him under oath, and may retain and examine any document or object.<sup>347</sup> With a court warrant, Investigating Directors may, through the agency of designated special investigators, conduct searches and seizures related to their investigations, which are somewhat broader in scope than usual—the item sought by the search does not have to be specified in the application for a warrant.<sup>348</sup>

By arrangement with the police service, Investigating Directorates may be assisted in their duties by police officers and detectives.<sup>349</sup> Heads of Directorates must immediately report to the National Commissioner of the Police evidence of any offense the Directorate itself is not investigating.<sup>350</sup>

The NPA is sometimes required to work with investigating organs other than the police. These include the following agencies: Independent Complaints Directorate (civilian oversight mechanism largely responsible for investigating police misconduct and deaths in police custody); National Intelligence Agency (domestic intelligence service); South Africa Secret Service (foreign intelligence service); Military Intelligence; South African Revenue Service (SARS); and “Chapter 9” institutions, such as

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342 The President may only issue such a proclamation on the recommendation of the Minister of Justice and the National Director, and must submit the proclamation to Parliament before publication. National Prosecuting Authority Act 32 of 1998, section 7(1)(a) and (2).

343 National Prosecuting Authority Act 32 of 1998, section 30(2).

344 These powers are contained in section 13 of the South African Police Service Act 68 of 1995.

345 National Prosecuting Authority Act 32 of 1998, section 28.

346 National Prosecuting Authority Act 32 of 1998, section 29.

347 National Prosecuting Authority Act 32 of 1998, section 28(6).

348 National Prosecuting Authority Act 32 of 1998, section 29.

349 National Prosecuting Authority Act 32 of 1998, section 4(a)(iv).

350 National Prosecuting Authority Act 32 of 1998, section 28(1)(d).



the Human Rights Commission, Auditor General, Commission for Gender Equality, and the Public Protector.<sup>351</sup>

The NPA has established formal cooperative structures with some of these investigative organs. For example, the NPA's Directorate of Special Operations and Asset Forfeiture Unit have established a formal working relationship with the South African Revenue Service, and the NPA works closely with investigators from the Revenue Service. All "Chapter 9" institutions have the power to investigate matters within their mandate. These institutions are limited to making recommendations, however, and have no powers of arrest or punishment, instead relying entirely on the relevant department to implement their recommendations. If their investigations reveal criminal conduct, then the matter is handed over to the police or prosecuting authority for further investigation and possible prosecution.

#### 4.5. Relationship with the judiciary

The judiciary and the NPA are distinct entities, and although they have traditionally shared certain administrative institutions and support functions, these connections have significantly decreased in recent years. The judiciary consists of judges who preside in High Courts, the Supreme Court of Appeal, and the Constitutional Court, and magistrates who preside over matters in the lower courts. Judges are normally appointed from the ranks of senior counsel in private practice or are exceptionally qualified and experienced magistrates.

Magistrates, in turn, have traditionally been appointed from the ranks of experienced prosecutors, and are consequently generally viewed to be technically proficient in criminal law but more punitive than judges, who generally do not have a prosecutorial background, in their approach. However, an increasing tendency since the end of apartheid in 1994 is to select magistrates from the ranks of private attorneys.

More prestige is attached to the position of judicial officer, especially that of judge, than that of all but the most senior members of the prosecuting authority. Moreover, the level of remuneration of judicial officers tends to be higher than that of prosecutors, especially when comparing the pay of magistrates with prosecutors working in the lower courts.<sup>352</sup> As a result, it is extremely rare for a judicial officer to become a prosecutor. There is, however, nothing in law preventing this.

Some tension has arisen between magistrates and prosecutors in some courts as the NPA takes a greater role in the establishment and running of courts, particularly Community Courts. This is because the magistrate has always traditionally been viewed as the "head" of a particular court and the NPA may be seen to be usurping

<sup>351</sup> The main purpose of these institutions is to strengthen the constitutional democracy in South Africa; they assist Parliament in its role as watchdog over the Government and state organs. See Constitution of the Republic of South Africa Act 108 of 1996, Chapter 9.

<sup>352</sup> Martin Schönteich, *Lawyers for the people. The South African prosecution service*, ISS Monograph Series, No. 53, Pretoria: Institute for Security Studies (March 2001), at 118-121.

that role. Various developments, such as diversion and plea and sentence agreements, have also moved the *locus* of decisional power to the prosecution and away from the magistrate.

The remuneration of judges, magistrates, and prosecutors comes from the budget of the Department of Justice, approved by the National Assembly.<sup>353</sup> However, the amounts allocated for these three categories comprise separate line items in the Department's budget, so that monies cannot be reallocated between them. The Judicial Services Commission and Magistrates Commission administer judges and magistrates respectively. Prosecutors fall under the administrative umbrella of the NPA. Since 2001, the NPA has had its own administrative support staff and financial and human resources experts, separate from the Department of Justice, while judges are still supported by Ministry staff.

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## **V. Publicizing the Prosecution Service's Activity**

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*Media relations and information access:* The NPA has a dedicated section for Communications, which falls under the CEO's Corporate Services. The NPA does not have dedicated public or media relations sections outside of the head office. In practice, the various DPP offices and the separate units within the NPA liaise with the media relations section at the head office, especially with regard to specific campaigns and media launches. Prosecutors are supposed to refrain from making media statements or comments.<sup>354</sup>

Media access to ongoing proceedings is somewhat limited by the NPA's confidentiality requirements. It is a criminal offense for prosecutors to disclose any information acquired in the performance of their official duties without the permission of the National Director or a person authorized in writing. This includes the contents of documents or evidence in the possession of the NPA or the investigative record created by an Investigating Director.<sup>355</sup>

*Public opinion:* A 2001 opinion survey of attitudes about the NPA among the general public, as well as crime victims and state witnesses who interacted with prosecutors, showed that only 47 percent of respondents thought that the NPA was effective in meeting its responsibilities. Individual components of the NPA received a higher effectiveness ranking, however, ranging between 49 percent and 84 percent.<sup>356</sup>

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353 (No publisher) *Department of Justice and Constitutional Development Annual Report*, Department of Justice and Constitutional Development 2003/04.

354 *National Prosecuting Authority of South Africa Policy Manual*, *supra* note 118.

355 National Prosecuting Authority Act 32 of 1998, section 41(6).

356 See Martin Schönsteich, "NPA in the dock. Thumbs up for the prosecution service," *SA Crime Quarterly* 3, Institute for Security Studies (March 2003), at 29-31.

People who had directly interacted with the prosecution service as state witnesses or crime victims were more positive about the work of the NPA than the general population. The great majority of state witnesses and crime victims surveyed said that the prosecutor they had dealt with was willing to help them (87 percent), had understood their concerns (86 percent), and that their human rights had been respected and protected during their court appearance (88 percent).<sup>357</sup>

People who had interacted with prosecutors were most likely to be dissatisfied with the service provided because of frequent postponements, numerous delays in the court process, and a lack of information provided by prosecutors. Even court users dissatisfied with some service standards expressed a high opinion of the prosecutor's professional competence; over four-fifths (82 percent) of court users said that prosecutors know "more" or "the same" as defense attorneys, and 89 percent of respondents thought that the prosecutor dealing with their case knew what to do.<sup>358</sup>

A more recent survey on public confidence in the criminal justice system conducted for the NPA found somewhat different results.<sup>359</sup> For the prosecution service, some 82 percent of respondents had "some" or "a lot" of confidence, with 18 percent saying they had "none at all." The survey found that among victims of crime, those whose cases had been to court were less confident in both the prosecution and the police than those victims who had not. Simple exposure to the court system (in any capacity, not just as a victim) was also correlated with decreased confidence in the police, the courts, and the prosecution service. The markedly differing results of this survey have been explained by postulating that the 2001 survey was essentially an exit poll which dealt with immediate impressions on leaving court that day, while the 2005 survey was a national survey, thus eliciting a more long term view which may have encompassed multiple trips to court.

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## VI. Statistics

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Data currently routinely collected by the NPA is primarily designed to measure efficiency (e.g. number of cases prosecuted), rather than effectiveness (e.g. improvement in public confidence in NPA or criminal justice system, or decline in public fear of crime), or fairness.

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<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> Redpath J, *Public Confidence in the Criminal Justice System: Results of a National Survey*, NPA Serurubele report (unpublished), April 2005.

Figure 2. Disposition of criminal cases, 2002/03-2005/06.

<b>Case Status</b>	<b>2002/03</b>	<b>2003/04</b>	<b>2004/05</b>	<b>2005/06</b>
New dockets received	484,547	514,355	523,169	517,101
New cases enrolled*	1,037,961	1,029,847	996,098	987,704
Cases removed from the roll**	500,886	720,154	681,032	707,656
Cases finalized with a verdict	358,057	347,737	335,974	335,028
Cases convicted (guilty verdict)	299,275	297,502	291,212	292,789

\* Includes enrollments arising from the previous year's dockets.

\*\* Includes diversions and transfers to another court.



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# Prosecutor Organization and Operations in the United States

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Heike Gramckow





## I. General Issues

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The prosecution services in the United States are probably the most diversely structured and decentralized prosecution services in the world. The U.S. Constitution establishes a federal republic comprised of 50 states and the District of Columbia, each with its own system of three separate branches of government. Under the U.S. Constitution, the 50 states retain considerable sovereignty and authority. Each state has its own elected executive (governor), legislature, and court system that is independent of the federal level. The constitution gives the federal, or national, government strong but limited powers. All other powers are constitutionally reserved to the states and the people.<sup>1</sup> The state courts have jurisdiction over a much wider variety of disputes than the federal courts, and law enforcement and criminal justice are traditionally regarded as state and local government responsibilities.<sup>2</sup> As a result, the vast majority of criminal prosecutions and civil lawsuits in the U.S. are handled in the completely separate state court systems of each of the 50 states.<sup>3</sup> Therefore, in order to understand the organization, structure, and operation of prosecutors in the U.S., we must focus on state level prosecutions. The federal level is interesting for comparison purposes, but does not provide a representative picture of prosecutors' offices and prosecutions in the U.S.

Since each state has its own constitution and set of laws that govern the structure and authority of its prosecutors' offices as well as the scope of legislation, there is significant variety among the 50 U.S. states and prosecution services. Furthermore, the vast majority of U.S. states have created a system in which individual and completely independent prosecutors' offices are established on the county level.<sup>4</sup> As a result, there are 2,341 independent prosecutors' offices on the local level in the U.S. Depending on the size of the jurisdiction, these offices can range in size from one or two staff members to over 1,000. Some have jurisdiction over civil or administrative cases, others do not. Most have jurisdiction over misdemeanor and felony cases, but not

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1 U.S. Const., Amend. X.

2 For an overview of state court responsibilities, see National Center for State Courts, *Examining the Work of State Courts* (2003).

3 The number of crimes that can be prosecuted on the federal level has increased; starting in the 1930s, and increasingly since the 1980s, Congress has adopted legislation giving federal prosecutors authority to prosecute crimes that were previously handled on the state and local levels. As a result, a number of crimes may be prosecuted by either state and local authorities or the federal government acting through the U.S. Attorney's offices. Because the federal government has greater resources devoted to its investigative agencies, in practice cases that are more difficult to investigate will often be handled by the U.S. Attorneys offices. Also, because some cases have more severe criminal penalties on the federal level, those cases may be brought to U.S. Attorneys offices. However, federal prosecutors still handle less than 10% of all criminal cases filed in the U.S. and an even smaller portion of all civil cases.

4 In 18 states, prosecutors cover judicial districts that may or may not coincide with county borders.

all.<sup>5</sup> Accordingly, the complexity of their organization, their need for management structures, and their capacities to handle certain types of cases, in particular large, complex cases, differ significantly.

Each state also has an independent Attorney General's Office. In some states, the state level elected<sup>6</sup> Attorney General has limited concurrent jurisdiction over criminal prosecution, but rarely exercises the authority.<sup>7</sup> In contrast, the federal level U.S. Attorneys' Offices, of which there are 94, served by 93 U.S. Attorneys,<sup>8</sup> are part of and under the control of the executive branch.

Most local prosecutors in the U.S. would argue that they represent one of the most independent prosecution services in the world.<sup>9</sup> Most Chief Prosecutors, often called District Attorneys (DAs), are elected in local popular elections. These DAs head an organization completely independent from any other branch of government or prosecution service, and are accountable only to the law and the people through the election process. They must account for their budgets, but do not otherwise report to anyone. Since local elections, even if they are non-partisan, require gaining popular support and can be quite costly, the independence of prosecutors has been questioned.<sup>10</sup> In responding to voters' demands, prosecutors walk a fine line between carrying out the will of the electorate and improperly subsuming their own professional judgment in exercising prosecutorial discretion.<sup>11</sup>

Prosecutorial independence in the U.S. is further intensified by the DA's wide margin of discretion. The DA can decide to pursue or drop cases brought by police. Most offices have no supervisory control over the police, but can decide to conduct their own investigations.<sup>12</sup> They can decide which charges to file, which pleas to accept, and which sentences to seek in individual cases, and set general policies for decision making for entire classes and types of cases. Over the past two decades, legislators

5 See Catherine Coles, *Community Prosecution, Problem Solving, and Public Accountability: The Evolving Strategy of the American Prosecutor*, (2000), a working paper of the John F. Kennedy School of Government, Harvard University.

6 In 43 states, the Attorney General is popularly elected. See *State Attorneys General: Powers and Responsibilities* (Lynne Ross ed., 1990).

7 Not all state Attorneys General have jurisdiction over criminal cases. Those that do, exercise jurisdiction only over a limited type of cases, and/or criminal cases committed in several counties in their state. In addition, city attorneys serving in municipalities that are independent from the county government may have jurisdiction over some misdemeanor cases, in addition to their general responsibility for providing legal council to the city government.

8 One U.S. Attorney is appointed to serve in each of the 94 federal judicial districts, with the exception of Guam and the Northern Mariana Islands, where a single U.S. Attorney serves both districts.

9 Robert Johnson, *Independence and Accountability of Prosecutors in the U.S.*, Paper presented at the 9<sup>th</sup> Annual Meeting of the International Association of Prosecutors, Seoul (2004).

10 Abbe Smith, *Can You be a Good Person and a Good Prosecutor?* 14 GEORGIA JOURNAL OF LEGAL ETHICS 355-369 (2001).

11 Ric Simmons, *Election of Local Prosecutors* (2004), available at [http://moritzlaw.osu.edu/election-law/ebook/part7/elections\\_prosecutors.html](http://moritzlaw.osu.edu/election-law/ebook/part7/elections_prosecutors.html).

12 In 2001, a majority of offices serving medium and large jurisdictions, i.e., with populations over 250,000 and over 500,000, reported having investigators on staff, including contract investigators. See Bureau of Justice Statistics, *Prosecutors in State Courts, 2001* (2001). In addition, prosecutors in a few states, such as New Jersey, have certain supervisory powers over police investigations.

have sought to limit some of the discretion of the judiciary by enacting sentencing guidelines and legislation such as “three strikes” laws.<sup>13</sup> These laws have conversely further increased the ability of prosecutors to negotiate sentencing options with defendants and their counsel.<sup>14</sup>

This broad range of discretion and independence requires mechanisms for accountability. While the DA is independent and has almost no reporting requirements,<sup>15</sup> a system of checks and balances exists that ensures that prosecutors abide by the law, act in accordance with ethical standards established for the legal profession, and are responsive to the needs of the community. As outlined in more detail in the following sections, these mechanisms include procedural safeguards; the influence of the courts on how cases proceed through the system and their outcomes; the strong role played by the defense and private bar in “monitoring” prosecutorial activities; the standard disciplinary procedures applicable to any lawyer; the role of private advocacy groups and the media in demanding justice; and last but not least, the very fact that DAs are elected. If the public does not feel that the DA fulfills the mandate of the office, the likelihood of reelection is small.

The independence of DAs and their responsibility to the public has also enabled and encouraged them to experiment with new approaches and institute innovations that increase their efficiency and responsiveness to the community. The diversity of offices and needs, combined with DAs’ flexibility, have resulted in the creation of many new programs to tackle special issues, such as repeat offenders<sup>16</sup> and victims with special needs,<sup>17</sup> or to address particular crime problems in targeted communities.<sup>18</sup>

The diversity of prosecution services in the U.S. makes it difficult to provide a complete picture of prosecutor offices and their operations. Still, there are sufficient commonalities among the state level prosecutors’ offices to present an overview of how they are structured and operate. Since they handle the large majority of cases, this report will focus predominately on state level prosecution offices. The federal system and divergent state systems will be presented when the differences are of interest for comparative purposes.

13 So-called three strikes laws are mandatory sentencing laws requiring long periods of imprisonment for persons convicted of felonies on three (or more) separate occasions.

14 Lisa L. Miller and James Eisenstein. *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW AND SOCIAL INQUIRY 239-269 (2005).

15 The funding authorities require reporting on the budget, and some states require general reporting on budget and operations by any agency that receives state funding.

16 See, e.g., E. Chelimsky and J. Dahmann, *Career Criminal Program National Evaluation: Final Report*, (1981), published by the National Institute of Justice.

17 For example, the Sacramento County (California) District Attorney’s Office established a special Adult Sexual Assault Prosecution Unit (ASAP), comprised of eight attorneys responsible for the prosecution of sexual offences involving victims 14 years and older. The ASAP unit works with the county’s Sexual Assault Response Team (SART), which is comprised of nurse practitioners and physicians’ assistants specially trained in the collection of sexual assault evidence, local law enforcement agencies, and counselors from a community rape crisis center.

18 Community oriented prosecution, for example, originated and continues to evolve in the U.S. See, e.g., Heike Gramckow, *Community Prosecution in the U.S.*, 5 EUROPEAN JOURNAL ON CRIMINAL POLICY AND RESEARCH 9-26 (1997).

## II. Structure and Organization of the Prosecution Service

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### 2.1. Structure of the prosecution services

*State prosecutors:* The state level prosecution system in the U.S. is highly decentralized. These offices, established along county or local court district lines, are completely independent. Each DA's office has completely different jurisdiction from the next and from the federal U.S. Attorneys' Offices. None has supervisory power over the other. Headed by a (generally elected) Chief Prosecutor, who may be serving in a part-time capacity if serving a low population county, DA's offices range in size from one or two to over 1,000 staff members in high population counties like Cook County (Chicago), Los Angeles (California), or Manhattan (New York). Most prosecutors' offices in the U.S. are relatively small, with an average staff size of 9, including the Chief Prosecutor. In 2001, half of all offices served districts of 36,000 people or less.<sup>19</sup>

Altogether, the over 2,300 local prosecutors' offices in the U.S. had a staff of approximately 80,000 in 2001.<sup>20</sup> A rate of 10 assistant prosecutors serving 100,000 residents has been fairly stable for the past 10 years.<sup>21</sup> This number may seem low in comparison to other countries. This is possible since many functions in the office are frequently carried out by non-legal staff, such as clerical support staff, investigators, and victim advocates,<sup>22</sup> allowing prosecutors to focus on their core prosecution functions and efficiently moving other responsibilities to non-legal staff with specialized skills and often lower salaries. Combined with the fact that prosecutors have the discretion to decline prosecutions and that almost 90 percent of all criminal cases in the U.S. result in plea bargains, which require significantly less time on the part of the prosecutor than going to trial, this allows prosecutors' offices to function with a comparatively small number of prosecutors.

The internal organizational structure of local prosecutors' offices also differs depending on the jurisdiction. Such structure is not regulated by law or rules and is solely at the discretion of the DA. Creating an efficient and functional internal structure that also provides effective reporting and accountability mechanisms is more an issue for mid- to large-size offices than for smaller ones.

Within a DA's office, authority is clearly hierarchical and policy setting is centralized. The DA sets case processing policies, and the rest of the office is charged with

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<sup>19</sup> See Bureau of Justice Statistics, *supra* note 12.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> In 2001, the ratio of assistant prosecutors to support staff was 1 to 1, the rate of attorneys to investigators was 3.6 to 1, and the rate of attorneys to victim advocates was 5.6 to 1. See Bureau of Justice Statistics, *supra* note 12.

implementing these policies. In the majority of small prosecutors' offices in the U.S., this is relatively easy to achieve, but in large offices with hundreds of prosecutors, investigators, and support staff operating throughout a large county or judicial district, establishing a well functioning organization is not a simple feat. Larger offices, such as the Los Angeles DA's Office, are generally led by a management team comprised of Deputy DAs, all of which serve at the pleasure of the DA and change when the DA changes.<sup>23</sup> Deputies may be assigned to head special crimes or regional divisions, some of which may be established separately from the headquarters.<sup>24</sup>

In large offices, deputies may not only be assigned to head special crime divisions, but may be designated to oversee administrative divisions. Well-functioning administration is not only a matter of office efficiency, but is key to ensuring accountability. Prosecutors are rarely trained in managing staff or special divisions, let alone planning for and managing other administrative functions, such as overall office operations, IT functions, finances, and budgets. Courts in the U.S. have benefited for the past 30 years from support by specialized court administrators,<sup>25</sup> but no equivalent position has been created in most state prosecutor's offices. Except in the largest offices, operations are still handled largely by prosecutors themselves or by administrative support staff not trained in general management operations for prosecutor's offices. Some DAs' offices can draw upon the support of their state's DAs' Association to provide some management support,<sup>26</sup> but generally speaking, management and administration of prosecutors' offices is still evolving in the U.S.

*Federal level:* In contrast, prosecutors on the federal level are part of the executive branch, i.e., the Department of Justice (DOJ). The DOJ is headed by the Attorney General, a cabinet level position appointed by the President. The DOJ enforces federal criminal laws and represents the U.S. in the federal courts. In addition to the various divisions within the DOJ in Washington D.C., there are 94 U.S. Attorney's offices across the United States, which represent the federal government in each district in federal criminal and civil cases to which the U.S. is a party.<sup>27</sup>

The U.S. Attorney's offices (U.S.AOs), too, vary in size and composition, from about 12 positions for the District of Guam to 360 in the District of Columbia, depending on the size and needs of the jurisdiction. In 2005, the 93 U.S.AOs, plus the office

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23 PriceWaterhouse, Applied Management and Planning Group, American Prosecutors Research Institute, *Management Audit of the Los Angeles County District Attorney's Criminal Prosecution Function* (1998).

24 See, e.g., the organizational structure of the Alameda County (California) DA's office, at <http://www.co.alameda.ca.us/da/daorg.htm>.

25 See PriceWaterhouse, *supra* note 23.

26 The number and independence of prosecutors' offices in the U.S. has led chief prosecutors to form professional associations on the state and national level. Most states have a "prosecutor coordinator" directing a staff that coordinates the activities of the state prosecutors, provides prosecutor training, and informs them of significant issues. State prosecutors have created the National District Attorneys Association (NDAA), which works on a national level much like the state prosecutors' organizations. It has a board of directors with representatives from each state. These organizations are important resources for state prosecutors and those who may want to interact with those prosecutors. For more information about NDAA and state prosecutor organizations, see NDAA website, [www.ndaa-apri.org](http://www.ndaa-apri.org).

27 For an overview of the responsibilities of the DOJ, see the DOJ website, [www.usdoj.gov](http://www.usdoj.gov).

serving the District of Columbia, had a total of 5,517 full time attorneys and 5,625 support staff, most focusing on criminal cases.<sup>28</sup>

In addition to the 94 headquarter offices, 128 branch offices have been established to facilitate geographic access and adequate caseload coverage. For example, the District of Maryland is comprised of two divisions, a Northern and a Southern Division, located in separate courthouses. The office's criminal division is situated in both locations.<sup>29</sup> Generally the offices are divided into at least a criminal, civil, and administrative division. Larger U.S.AOs may also have an appellate division. In large jurisdictions, each division may be comprised of several groups handling certain types of cases. The Criminal Division of the U.S.AO in Phoenix, for example, has three groups: one for violent crimes, the second for economic fraud, and the third for drug and immigration cases.<sup>30</sup>

Management support, in particular for key internal accountability and reporting structures, such as data collection and overall reporting assistance, budget development, and human resources management, is provided by the Executive Office of U.S. Attorneys (EOU.S.A).<sup>31</sup>

## 2.2. Independence of prosecutorial decision-making, accountability, and safeguards in the system

*State level:* Independence of prosecutorial decision making in the U.S. is different from the independence of judicial decision making. On the local level, most chief attorneys in the U.S. are directly elected by the people of the jurisdiction they serve in a general election and for a set term (4-8 years).<sup>32</sup> There are no term limits, except in the State of Colorado, and the requirements for running for election are quite minimal; generally one need only have passed the local bar and be a local resident. Significant experience and good standing are helpful in winning an election. While experienced candidates therefore stand a good chance of winning or being reelected, recent law school graduates have in some cases run and won elections.<sup>33</sup> The elections are an indicator of the DA's ability to connect with the community and other justice agencies.

Prosecutors' offices are hierarchical institutions where only the DA is elected or otherwise appointed in a democratic process. By electing the DA, the people authorize

28 See Executive Office for United States Attorneys (EO USA), *United States Attorneys' Annual Statistical Report* (2005).

29 See United States Attorney's Office for the District of Maryland, <http://www.usdoj.gov/usao/md/index.html>.

30 See website of the United States Attorney's Office, overview of District of Arizona, <http://www.usdoj.gov/usao/az/office.html>.

31 For more detail on the responsibilities and organization of the EOU.S.A, see [www.usdoj.gov/usao/eousa](http://www.usdoj.gov/usao/eousa).

32 Over 95% of the DAs in the states are directly elected by the people in the jurisdiction for which they are the prosecutor. See Bureau of Justice Statistics, *supra* note 12.

33 Robert Johnson, *supra* note 9.



the DA to establish policies for implementing the laws. Assistant DAs must therefore follow these policies, as long as they are within the scope and meaning of the laws the policies aim at enforcing. Other individual prosecutors are not fully independent in their decision making as individual judges are. Unlike judges, assistant prosecutors are tied to the general policy directives issued by the DA (or the AG on the federal level).

Prosecutorial policies differ among prosecutors' offices and the state and federal levels as a result of the different laws that govern their decisions, the discretion enjoyed by prosecutors in the U.S., and each individual DA's vision for pursuing crime in his or her jurisdiction. Since laws are generally written in quite abstract terms to fit a broad range of situations, prosecutors in all countries use some degree of discretion in their decisions to file a case in court, the charges applied, and the sentence they seek. This is a reality even in countries that do not formally recognize prosecutorial discretion. However, in the U.S., prosecutorial discretion is particularly broad. It allows prosecutors to decide not to pursue cases that are brought to them by the investigative authorities. For offices with investigative resources, it also allows them to investigate cases that are not or are insufficiently pursued by law enforcement. It allows prosecutors to drop charges in exchange for a plea or information and to bargain about the sentence pursued.

The benefit of this situation is that DAs can set policies that fit their jurisdictions and their budgets. A DA's prosecution policies may vary over time to reflect the need to respond to particular crime trends and, to some extent, the personal crime policy of the DA—the “platform” he or she was elected on. Concretely, this means that a DA may have a policy of not pursuing certain misdemeanor violations, such as prostitution.<sup>34</sup> It may also mean a policy of pursuing certain crimes leniently or aggressively.<sup>35</sup> The DA may require that no plea offers are made in certain types of serious cases, such as child abuse. These policy decisions are not regulated, and different offices follow different principles, with the minimum requirement being legality—that is, that all legally required elements of the crime are substantiated. Office resources may limit a prosecutors' ability to proceed with all cases that fulfill the evidentiary requirements, pushing the DA to set processing priorities or even limit the range of cases to be pursued. DAs can find guidance for establishing policies for screening, charging, diversion, and plea negotiations in the National Prosecution Standards developed by the National District Attorneys Association (NDAA).<sup>36</sup> Their state's DA association may also be of assistance. The NDAA standards are not binding, but provide guidance based on lessons learned in offices of all sizes throughout the U.S. The only limit on these policies is the margin of discretion permitted by law and the state's professional ethics rules.

The drawback is the potential—and actual—variation in charging, plea, and sentenc-

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34 Fifteen years ago, the State's Attorney in Montgomery County (Maryland), for example, issued a policy that simple prostitution cases would no longer be prosecuted by his office.

35 For example, a former DA in San Francisco won two terms after campaigning on a platform of leniency and alternative sentences for drug crimes and prostitution. See Patrick Hoge, DA Hallinan Holds Fast to Long-Held Convictions, *San Francisco Chronicle*, October 23, 2003, at A 19.

36 National District Attorneys Association (NDAA), *National Prosecution Standards* (2d ed. 1991), available at [ndaa.org/pdf/ndaa\\_natl\\_prosecution\\_standards.pdf](http://ndaa.org/pdf/ndaa_natl_prosecution_standards.pdf).



ing policies within a state or even within a county if the DA changes, as well as the potential for DAs to adjust policies to win elections.<sup>37</sup>

Small prosecution offices may not see a need for detailed formalized policies. DAs with no assistants or only a small number may believe they can communicate policy informally. The larger the office, the more difficult it is to ensure that the policies set by the DA are followed. Well structured offices therefore have comprehensive policy manuals that outline policies and how they should be applied to prosecutorial decisions.<sup>38</sup> As a practical matter, most chief prosecutors allow their assistants discretion over which cases to pursue and how to pursue them.

When establishing general policies, DAs in tune with the needs of the various neighborhoods and communities they serve will listen to recommendations from prosecutors serving in various areas—if the office is organized by geographic areas—or generally recognize the need for differing prosecution strategies related to problem areas, as expressed by residents and local law enforcement. The development and spread of community oriented prosecution in the U.S. is one means used by DAs to better respond to the needs of their communities.<sup>39</sup>

The public holds the DA accountable through elections. Once elected, a DA is not responsible to anyone but the voters. There are no reporting requirements, and national standards for prosecutors' offices established by the National District Attorneys Association<sup>40</sup> and the American Bar Association (ABA)<sup>41</sup> are non-binding and do not include performance measures for individual prosecutors or even offices. Still, DAs are generally very cognizant of the need to operate efficiently and transparently. A majority of offices try to implement the NDAA standards<sup>42</sup> and may regularly post information about the office.<sup>43</sup> Many large state prosecution offices publish an annual report that they distribute widely. Such reports are created in a format designed to be understandable to the general public, as their purpose is both to inform the public and applaud the chief prosecutor. However, prosecutorial policies and statistics related to prosecutorial decisions, from filing and charging to plea bargaining, conviction rates, and sentencing statistics, while regularly collected and sometimes published in an annual report, are not always readily available in a way that would allow insight into office performance.<sup>44</sup>

37 These differences can be significant. For example, it has been reported that the DA in Harris County (Houston, Texas) is responsible for 10% of all executions in the country. Mike Tolson and Steve Brewer, Harris County is a Pipeline to Death Row, *Houston Chronicle*, Feb. 21, 2001 at 1.

38 A survey conducted in Minnesota, for example, indicated that about 52% of county attorneys and 25% of city prosecutors had or were developing written guidelines in 1995. Smaller jurisdictions were less likely to have written guidelines than more populous ones. See Office of the Legislative Auditor, *Non-Felony Prosecution—A Best Practices Review* (1997), available at [www.auditor.leg.state.mn.us/ped/bp/nf97.htm](http://www.auditor.leg.state.mn.us/ped/bp/nf97.htm).

39 See, e.g., LA County District Attorneys Office, *Policy and Procedures Manual*.

40 NDAA Standards, *supra* note 36.

41 ABA Standards for Criminal Justice: Prosecution Function and Defense Function (1993), see [www.abanet.org/crimjust/standards/pfunc\\_blk.html](http://www.abanet.org/crimjust/standards/pfunc_blk.html).

42 Considering that a majority of offices are members of the NDAA, this statement made by NDAA board members appears reasonable.

43 See, e.g., <http://www.brooklynnda.org>.

44 A review of the websites of the larger jurisdictions in the U.S. (available at [www.eatoncounty.org/](http://www.eatoncounty.org/))

Fiscal accountability to the respective funding authority is established by relevant state and county laws. These may set additional reporting and auditing requirements, including some limited performance measures.<sup>45</sup>

Overall, all prosecutors' offices underlie the requirements of Freedom of Information Act and public hearing rules applicable in their jurisdiction,<sup>46</sup> which provide the public with access to information and decisions from within the DA's office, but formal reporting requirements related to office and individual prosecutor performance do not exist. While standards and performance measures have been established for courts and even individual elected judges, they have not been developed as yet for state prosecutors.

Elected DAs cannot be removed from office during their term by anyone, except through a state disciplinary procedure for violating the ethics rules established by the state's attorney licensing authority, and/or if they have been convicted of a serious crime and therefore lose their license to practice law.<sup>47</sup>

Each state's ethics rules for lawyers also have specific sections relating to prosecutors. Complaints about a prosecutor's conduct violating these provisions may be made to the state legal ethics authority, and gross violations will result in serious sanctions. These ethics rules cannot address or limit the range of prosecutorial discretion, such as a decision not to charge a case or to charge or bargain a provable case. The Bar Association generally establishes a complaint, review, and disciplinary process to address matters of questionable professional conduct. Some states, such as Missouri, changed to a commission system to address such issues. The disciplinary process differs to some extent from state to state, but they generally follow a process similar to the one established by the Virginia State Bar (VSB) Association:

The VSB receives written complaints from the public, judges, and other lawyers about conduct that might violate ethics rules. Each complaint is sent to the Office of Bar Counsel, where it is analyzed by the Intake Office, staffed by lawyers and assistants. If the office decides that the complaint does not constitute a violation of the areas regulated by the bar, no further action is taken and the complainant is notified in writing.<sup>48</sup> The Intake Office's decision not to pursue a complaint may be reviewed

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prosecutor/proslist.htm) showed that all provide information about general office operations and other details of interest to the public; however, operational statistics are rarely provided. One notable exception is the Thurston County (Washington) Prosecutor's office, which publishes its annual report on the web. See [http://www.co.thurston.wa.us/pao/PAO\\_2001Report/2001\\_annual\\_report.htm](http://www.co.thurston.wa.us/pao/PAO_2001Report/2001_annual_report.htm).

45 State laws, in particular, increasingly require performance measure-related reporting of operations, budgets, and expenditures from any agency that receives state funding. See, e.g., Franklin County (Ohio) Prosecuting Attorney, [www.franklincountyohio.gov/commissioners/budget/apps/04Budget/programOverview\\_final.cfm?id=43&program=43A306](http://www.franklincountyohio.gov/commissioners/budget/apps/04Budget/programOverview_final.cfm?id=43&program=43A306).

46 On the federal level, this is the Freedom of Information Act, 5 U.S.C. § 552, As Amended By Public Law No. 104-231, 110 Stat. 3048. See [usdoj.gov/oip/foia\\_updates/Vol\\_XVII\\_4/page2.htm](http://usdoj.gov/oip/foia_updates/Vol_XVII_4/page2.htm). For a state example, see the New York State Freedom of Information Law and Open Meetings Laws, available at [www.dos.state.ny.us/coog/coogwww.html](http://www.dos.state.ny.us/coog/coogwww.html).

47 Even then, it is theoretically possible that they can be reelected if they regain their license. There have also been instances where DAs who were debarred tried to remain in office until their terms ran out.

48 Violations of professional rules include unprofessional behavior and ethics violations, but not rea-

by the Bar Counsel, and its decisions are randomly reviewed by a supervisory committee composed of attorneys and members of the public. If a rule might have been violated, the VSB investigates the situation.<sup>49</sup>

If a lawyer is found to have violated an ethics rule, one of the following levels of discipline may be imposed:

- ▶ The lawyer could receive an **admonition or reprimand**, meaning he or she will be informed about what rule has been broken and a notation is made on the lawyer's bar record; or
- ▶ The lawyer's license to practice law could be **suspended** for up to 5 years; or
- ▶ The lawyer's license could be **revoked**, which means the lawyer is disbarred from the practice of law in that state.<sup>50</sup>

If there is no ethical or criminal violation, no effective complaint procedure exists against an act or decision of a DA. Any complaint may be made to the media, but the only effective remaining recourse for the aggrieved person is the next election.<sup>51</sup> Complaints about acts or decisions by assistants may be made to the DA, and will generally lead to a review of the matter.

*Federal level:* U.S. Attorneys are appointed for four years by the President and serve at his pleasure. Federal prosecutors are guided by DOJ policies when applying discretion in their decision making process. These DOJ policies in turn largely reflect the President's crime policies. At the same time, the Attorney General may have priorities or initiatives that he/she would like to emphasize through the various U.S.AOs. Such direction comes from the Attorney General through the EO.U.S.A. The EO.U.S.A. helps coordinate the initiatives through the various U.S.AOs nationwide by formulating guidelines, assisting in their implementation, and providing related training. However, the discretion to decide which individual cases to charge, in most instances, remains with the individual U.S.AO. In certain instances, the Attorney General does provide direction. For example, he will determine in all "capital" cases whether the death penalty will be sought. The Attorney General, through special DOJ Divisions, also retains control over certain types of cases, i.e. tax cases and criminal civil rights cases. In these types of cases, the individual U.S.AO must obtain authorization to indict.<sup>52</sup>

U.S. Attorneys retain significant discretion to set prosecution priorities and policies in their own districts. These priorities vary based on the particular needs of the district as well as the vision of the U.S. Attorney for the office. For example, since most drug cases can be pursued under state as well as federal law, cases that federal authorities can pursue more efficiently than state authorities, such as complex drug

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sonable professional decisions within the margin of discretion. For more detail, see Virginia State Bar Association, [www.vsb.org/profguide/index.html](http://www.vsb.org/profguide/index.html). If a criminal violation is suspected, the case will be forwarded to the relevant investigative agency.

49 See Virginia State Bar Association, *id.*

50 *Id.*

51 See Robert Johnson, *supra* note 9.

52 See United States Attorneys' Manual, available at [www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam).

cases involving organized crime, may be referred to federal agencies.<sup>53</sup> The U.S.AOs thus develop different policies regarding the cases they will take at the request of state authorities. Specifically, the political interest in pursuing certain crimes and the resources available determine policies on when to adopt such cases in an individual jurisdiction. For example, the U.S.AO in one jurisdiction may require more drugs to be involved for it to consider a case for prosecution than his colleague in another.<sup>54</sup> Similarly, one study indicated significant differences among U.S.AOs' willingness to seek the death penalty.<sup>55</sup> Prosecutorial initiatives may be based on the specific needs of the particular district. Where violent crime is a significant problem, the U.S.AO may prosecute large numbers of possession of firearms cases, cases generally left to state and local authorities, to help reduce the level of violent crime.<sup>56</sup>

U.S. Attorneys are responsible for reporting their activities to the Attorney General.<sup>57</sup> For that purpose, the Case Management Staff of the EOUSA maintains a central caseload and collection management system. This system is used to respond to requests for statistical information and to produce management reports for use within the DOJ. This information is also used to allocate resources to the various U.S.AOs, produce the U.S. Attorneys' Annual Statistical Report, and meet the accounting requirements for debts collected by U.S. Attorneys. U.S. Attorneys also develop a Monthly Resource Summary Report that reports the use of personnel resources allocated to the office. The information from this report is used for budget formulation and justification and for monitoring resource allocation.<sup>58</sup>

The DOJ, through the Office of Evaluation and Review, evaluates each U.S.AO once every three years, to ensure each office is in compliance with DOJ policies and practices. The main purpose is to review the operations of each office and make recommendations for best practices and to require corrective action where indicated.<sup>59</sup>

### 2.3. Internal supervisory and accountability structures

*State level:* Assistant prosecutors generally serve at the pleasure of the DA and must comply with general charging, filing, plea bargaining, and trial policies established by the DA. Office policies set the framework for individual prosecutors' work and accountability, and well run offices issue policy and procedures manuals to all staff and train them on it. Generally, senior prosecutors advise junior prosecutors on applying

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53 *Id.*

54 See Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United State Attorneys' Offices*, 46 HASTING LAW JOURNAL 1319-25 (2002).

55 See Denise Lieberman (American Civil Liberties Union), *Prosecutors: The First Line of Offense. Prosecutorial Discretion and Arbitrariness in Administration of the Death Penalty* (2001), available at <http://www.mindspring.com/~emcadp/ACLU/UDenise.html>.

56 See Lisa Miller and James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 20 LAW AND SOCIAL INQUIRY 239-268 (2005).

57 The 2003 annual AG's report can be viewed at <http://www.usdoj.gov/ag/annualreports/ar2003/index.html>.

58 *Id.*

59 *Id.*

the policies. In this way, senior prosecutors ensure that the DA's policies are followed. Offices that value good management and performance also track the extent to which individual prosecutors' decisions comply with existing policies, within a reasonable range of discretion. The DA and other supervising prosecutors may and will intervene to ensure that cases are handled within the generally set policy framework.

In smaller offices, supervision and communication about cases will be informal, through regularly scheduled or ad hoc meetings. The larger the office, the greater the need for more formal structures for communication and review. Results from organizational studies<sup>60</sup> indicate that larger offices tend to create specialized screening or intake units to review cases brought by the police to decide whether to accept them for prosecution, what charges to apply, whether to request additional investigation with or without prosecutorial input, and which prosecutor to assign to the case. Considering the important decisions made at this stage, it is generally recommended that experienced prosecutors staff these intake units to increase efficiency and to ensure that cases are either sent forward or, if not substantiated by sufficient evidence or if prosecution is not in the interest of the public, are dropped or sent back to the investigative agency.

Reviewing the case to ensure not only that sufficient evidence supports the charge, but that all evidence was collected according to the law, is of particular importance. Evidence rules in the U.S. apply strict standards for weighing the legality and admissibility of evidence. Exclusionary rules prohibit the use of any evidence not collected in accordance with procedural rules and regulations.<sup>61</sup>

The screening process is structured in different ways in different offices. Where a special screening unit exists, the investigating officers may discuss the case file and the merits of the case with the screening prosecutor. The prosecutor may point out weak points, and together they will weigh the need for additional information and next steps, including alternatives to prosecution if appropriate. Even where special screening units are established, investigators will not always be available or screening prosecutors may prefer a file review without input from the police officer. While the latter may make the screening process faster, it is likely to necessitate increased communication between the investigative agency and the prosecutor's office and result in a higher potential for misunderstandings. Not all DAs' offices have the manpower to staff a special screening unit; they may, however, still have the ability to rotate the responsibility for case screening among more experienced prosecutors.<sup>62</sup>

After screening, the case will be assigned according to the policies, size, and structures of the office. In the majority of smaller offices, there is no opportunity for exclusive specialization. Cases will be assigned by the DA or next senior prosecutor by a policy determined office by office. In larger offices, cases often will be assigned to

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60 See Joan Jacoby, Peter Gilchrist, and Edward Ratledge, *Prosecutors Guide to Intake and Screening* (1999), published by the Jefferson Institute for Justice Studies.

61 Exclusionary rules are prevalent in the U.S. as a way to protect the accused from illegal police activities and curb overly eager law enforcement efforts to collect evidence. See Edwards, *Criminal Liability for Unreasonable Search and Seizure*, 41 VIRGINIA LAW REVIEW 621 (1955).

62 Jacoby et al., *supra* note 60.

special divisions, and within those divisions to individuals or teams. Still, the DA, as the elected official, always has the discretion to realign assignments.

Cases may be assigned to vertical or horizontal handling. Vertical prosecution requires that a single prosecutor handle a case from start to finish, i.e., from investigation through trial, sentencing, incarceration, and probation or parole, and in some cases from juvenile or family court to adult criminal court. The theory behind vertical assignments is that a single prosecutor handling a case exclusively from beginning to end will be able to conduct it more effectively than if different prosecutors handled the case at the different stages of the process (i.e., horizontal prosecution).<sup>63</sup> Vertical prosecution is generally preferred for more complex cases, while efficiency concerns often require some horizontal processing.

An office may be organized into special units that handle certain types of cases (i.e. domestic violence, murder, or drug crimes) vertically. The office may have a mixed structure, for example with misdemeanors or simple felonies being handled horizontally and more serious case types vertically. Prosecutors may handle cases individually, or a case may be assigned to a team, under the leadership of a senior attorney, that handles it from filing through disposition and sentencing and beyond. The benefit is that team members can support each other in complex cases and junior prosecutors have an opportunity to learn from senior ones.

If a case presents a real or perceived conflict of interest for the office, it will be referred to another state prosecutor's office or to a private attorney. Such cases often involve a defendant who has a connection to the prosecutor's office or someone who is a victim in one case while being accused in another.

*Federal level:* On the federal level, case assignment practices vary among the different U.S.AOs. Medium and small offices will likely have a practice of horizontal prosecutions, while larger offices may not. Most medium to larger U.S.AOs have some specialization in criminal prosecutions, for example white collar crimes, drug prosecutions, and crimes of violence. Cases will be assigned to these respective divisions, but the opportunity exists in many offices for a prosecutor to handle cases outside his/her particular group. Ultimately, the U.S. Attorney in any office has the authority and discretion to assign and reassign cases; however, cases assignments are almost always handled by supervisory Assistant U. S. Attorneys (AU. S. As).

## **2.4. The status and accountability of individual prosecutors**

*State level:* Assistant prosecutors, while often serving at the discretion of the elected DA, may generally only be removed for good cause. In jurisdictions where assistant

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<sup>63</sup> Prosecutors in gang units, for example, are usually specialists with greater knowledge of gang culture and activities. They can develop better follow-up investigation, control, and continuity, thereby increasing the chance of successful prosecution of more serious gang charges. K. Ehrensaft, *Prosecutor Models*, (1991), published by the U.S. Dept of Justice, Office of Juvenile Justice and Delinquency Prevention.



prosecutors are civil servants, they enjoy the protection of the civil service system as it relates to salary, promotions, and dismissal, but this does not extend their discretionary powers beyond the policies the DA establishes, and frequently excludes those appointed to management positions. Deputy DAs therefore tend to change when the DA changes.

Codes of conduct and related disciplinary procedures established by each state's Bar Association apply to all lawyers in that state. NDAA and ABA standards contain references to professional conduct and ethics, but do not formulate a national model code of conduct for prosecutors.<sup>64</sup> At a minimum, prosecutors are expected to avoid activities that are likely to appear to, or actually do, conflict with the duties and responsibilities of their office. With this general guidance in mind, prosecutors may engage in religious or civic activities, as well as partisan activities that are legal and ethical, as long as they do not interfere with their prosecutorial work. Generally, prosecutors' offices prohibit assistant prosecutors from actively soliciting support for religious groups or political parties within the office, and such activities are not supposed to be conducted in conjunction with prosecutorial work. On the other hand, it is not uncommon for assistant prosecutors to be asked to actively support the reelection of their DA.

To assist individual prosecutors in applying the DA's policies with consistency and accountability, the DA may not merely establish policies, but may issue more detailed guidelines for adhering to them.

The DA or the supervisory prosecutor may also instruct an Assistant DA on how to act in a particular case. If individual prosecutors do not follow these directions, a complaint may be launched, an internal disciplinary action may be taken against them, and the DA may reassign the case to another prosecutor. Individual offices often establish processes for internal review, with consequences up to and including termination of employment. Assistant DAs who significantly and frequently diverge from the DA's policies are likely to lose their jobs.<sup>65</sup>

Performance measures for individual offices and/or prosecutors are not well established. Many offices focus assessments and performance measures on overall behavior and attitudes, such as conviction rates, and less on specific office goals and objectives. One reason is that traditional measures of office and prosecutor performance, such as conviction, dismissal, and incarceration rates, depend on office policies and other external factors and are not a good measure of individual performance. They may lead to decisions that are at odds with the obligation to pursue justice. They also do not measure the performance of special programs, such as community oriented prosecution or victim services. Another reason is that no national performance stan-

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<sup>64</sup> See ABA Standards, *supra* note 41.

<sup>65</sup> In most states, ADAs serve at the pleasure of the DA, meaning they can be dismissed if they frequently fail to follow policies. In some states, ADAs are part of the state's civil service system and part of civil servant units that limit the DA's ability to terminate ADAs. These limitations do not, however, limit the ability to terminate an assistant who repeatedly refuses to comply with office policies or direct orders from the DA. All systems would consider such conduct just cause for termination.



dards for prosecutors (or offices) that focus on overall goals have been established.<sup>66</sup> New efforts to establish measurements of prosecutorial performance are focusing on establishing overall goals that can be applied across offices, but they have not yet resulted in acceptable benchmarks and performance standards.<sup>67</sup> One internal measure some offices apply is the extent to which individual prosecutors adhere to office policies. If collected and analyzed across all prosecutors, this provides a tool to identify divergences that may indicate whether individual prosecutors abide by the DA's policies within an acceptable margin of discretion, or if policies need to be adjusted or training and guidance materials enhanced.

Prosecutors enjoy absolute immunity from civil liability when initiating and pursuing criminal prosecution,<sup>68</sup> but have no immunity from criminal liability for acts in the course of their work or outside their work as prosecutors. The Supreme Court did not extend absolute immunity to prosecutor actions involving investigative activities, and some lower courts have established only a qualified defense for such activities. Prosecutors' offices may obtain insurance to cover the cost of defending a civil suit against a prosecutor. If this insurance does not cover all potential costs of such a suit or is not available, prosecutors may pay for their own insurance.

*Federal level:* A.U.S.As also operate under the general directions and guidelines established for their offices. In practice, they can apply their own discretion within this framework. While U.S. Attorneys are appointed and subject to removal at the will of the President,<sup>69</sup> A.U.S.As are appointed by their U.S. Attorney and may be removed for cause by that official.

The Government Performance and Results Act (GPRA) of 1993 requires all federal agencies to set goals and objectives, measure performance, and report their accomplishments in order to move toward a performance-based environment. In accordance with this legislation, the EO.U.S.A developed performance measures for U.S. Attorneys' activities, and is exploring ways to measure performance in individual U.S.AOs. The Attorney General's report for the DOJ's fiscal year 2005 Congressional budget submission included an outcome measure—percentage of cases favorably resolved—that is intended to show how U.S. Attorneys contribute to the DOJ's overall mission. The EO.U.S.A is also developing performance indicators to measure progress toward implementing special initiatives, such as programs to curb gun violence, and conducts related performance evaluations that are summarized in reports for the Deputy Attorney General and the Attorney General, who are in turn responsible for reporting the results to Congress.

Performance of all attorneys and support staff of a U.S.AO is reviewed on an annual basis. The evaluation is based on Performance Work Plans that must contain

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66 Courts, in contrast, have been working on developing such standards since the mid-1980s. In 1987, the National Center for State Courts initiated the Trial Court Performance Standard Project to develop measurable performance standards for state trial courts.

67 American Prosecutors Research Institute, *Prosecution in the 21<sup>st</sup> Century—Goals, Objectives and Performance Measures* (2003).

68 *Imbler v. Pachtman*, 424 U.S. 408.

69 *Parsons v. U.S.*, 167 U.S. 314 (1897).

one or more critical performance elements. These elements must include a written standard of performance that defines the rating for successful performance in such terms as quality of work, quantity of work, timeliness, individual or group goals and objectives, or other such terms that are appropriate for the position. During the performance review, the rating officials evaluate actual employee performance based on written performance standards.<sup>70</sup>

As federal employees, assistant A.U.S.As are free to engage in legal and ethical religious, civic, and certain political activities outside their office. However, as employees of the DOJ they are required to enforce the laws of the U.S. in a neutral and impartial manner. Therefore, for the public to retain confidence in its prosecutors, A.U.S.As must ensure that politics or religious views do not compromise the integrity of their work.

Specific statutory restrictions on political participation applicable to all employees limit political activities in conjunction with their offices.<sup>71</sup> Attachment A outlines which types of activities fall under these restrictions.

A.U.S.As are subject to the same ethics process as state prosecutors. Further, the DOJ's Ethics Office, located in the Justice Management Division, is responsible for administering a DOJ-wide ethics program and for implementing DOJ-wide policies on ethics issues. The office provides advice and training and supervises the ethics programs of the U.S.AOs. Each U.S.AO assigns a staff member to serve as the Deputy Designated Agency Ethics Official responsible for administering the ethics program within the office. In addition, the Professional Responsibility Advisory Office provides answers to ethics questions and is a helpful resource for designated ethics officers.

The DOJ's Office of Professional Responsibility (OPR) investigates allegations of misconduct by DOJ attorneys that relate to investigations, litigation, or the provision of legal advice. The Inspector General (OIG) has authority to investigate other allegations of misconduct by any Department employee not related to the practice of law. All U.S. Attorney staff are required to report to their supervisors any evidence of misconduct that may be in violation of any laws, regulations, or professional standards. Supervisors then evaluate whether the misconduct is serious, and if so report it to the appropriate investigative office. Reporting through the chain of command ensures that supervisors are aware of any problems within their offices. Because some complainants may wish their identities kept confidential, complaints may also be made directly to an investigative office. The decision to report an allegation does not create any inference that the allegation is well founded. This is an important reassurance to employees who are the subjects of unwarranted allegations of misconduct that their supervisors are obligated to report.

After the OPR receives an allegation, it conducts a preliminary review and opens an investigation only if it concludes that further investigation is warranted. Upon

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70 See U.S. Attorneys' Manual, *supra* note 52.

71 In 1994, Congress amended the Hatch Act, 5 U.S.C. 73121-7326, to remove certain restrictions on political participation by most government employees.

completion of an investigation, the OPR notifies the subject, the supervisor, and the complainant.

Disciplinary actions and grievances against A.U.S.As are sensitive issues and must be coordinated with the EOU.S.A Legal Counsel's office. The authority to initiate and implement disciplinary actions against A.U.S.As is delegated to the Director of the EOU.S.A or a designee. Limited authority for disciplinary actions against A.U.S.As has been delegated to U.S. Attorneys, who can issue written reprimands and initiate suspensions of 14 days or less.

Disciplinary actions can include reprimands, reductions in grade/pay, furloughs for 30 days or less, suspensions, and removals. An employee who receives a reprimand or a suspension for 14 days or less may request a review of the action by filing a grievance. If the immediate supervisor lacks the authority to resolve the grievance, it must be referred to the next level management official within the district or the EOU.S.A. Once a decision is issued, there is no further right of review. More serious disciplinary actions must be appealed to the Merit Systems Protection Board; such appeals are coordinated by the Legal Counsel's Office of the EOU.S.A.

Civil and criminal liability is the same as for state level prosecutors. Therefore, federal prosecutors also carry professional liability insurance. The DOJ will partially reimburse law enforcement officers, attorneys, and supervisors and managers for this insurance.<sup>72</sup>

## **2.5. Selection requirements and training**

*State level:* Official requirements for becoming a prosecutor in local offices are generally limited to having acquired a law degree from an accredited law school and passed the state bar exam. This requirement generally applies to the elected chief prosecutor as well as to assistant prosecutors. In order to be elected, however, one must have the stature (and finances) to gain a majority of the public vote. For assistant prosecutors, individual offices set different criteria that are often driven by the availability of qualified candidates. Offices may set individual requirements that fit their office's mission and philosophy. In practice, many offices require some prior experience either as a prosecutor in another office, an intern in a prosecutor's office, a law clerk at a court, or in private practice. The more competition for positions, the higher the requirements. Individual prosecutors are usually either hired after the position has been advertised or are selected throughout the year in a regular cycle.

In the past, younger attorneys were attracted to DAs' offices to gain trial experience before moving to the more lucrative private sector. However, the increasing demands of large private firms on their attorneys and an oversupply of lawyers has encouraged a trend towards careers in prosecutors' offices. It is not unusual to have 50 to 100 applicants for an open position, except in offices in rural areas. Often successful can-

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<sup>72</sup> Section 636 of the FY 2000 Treasury, Postal Service and General Government Appropriation Act.

didates come from small rural offices, where they gain the experience necessary to be successful applicants. Once in a large office, they can progress to more responsible and supervisory positions. In smaller offices, a senior prosecutor may seek to become the DA if the DA resigns or is not adequately performing.

After hiring, prosecutors generally have no further training requirements other than the continuing legal education (CLE) requirements established for practicing attorneys by the attorney licensing authority in each state. CLE requirements vary somewhat from state to state. In general, they require participation in approved education courses, including ethics classes.<sup>73</sup>

While prosecutors have different needs for skills training than other legal professions,<sup>74</sup> and prosecutors operating in special divisions or in managerial positions have very special educational needs, no standards have been established for their education. Also, participation in training is rarely linked to performance evaluations or promotion of individual prosecutors. Prosecutors have the opportunity to participate in CLE courses offered by their state bar association, private legal education organizations, internal office training, or their state's prosecutors' association. The costs are generally carried by the individual prosecutor, sometimes reimbursed by the office. Since 1998, the National Advocacy Center (NAC) has been dedicated to addressing the training needs of local prosecutors.<sup>75</sup>

*Federal level:* In each district, A.U.S.As are appointed by the Attorney General, although in practice all hiring decisions in a U.S.AO are made at the local level.<sup>76</sup> The federal rules for hiring are complex and detailed.<sup>77</sup> Although the EO.U.S.A has specified certain required procedures for hiring new A.U.S.As, for the most part the process used for hiring is determined by each U.S.AO.

Because U.S.AOs are considered prestigious places to work, most vacancies generate a large number of applicants. In many offices, the U.S. Attorney create a committee to screen and interview candidates and recommend a certain number for his/her final interview and selection. Applicants for A.U.S.A positions must possess a J.D. (law degree) from an accredited law school, be an active member of the bar (any jurisdiction), and have at least 2 years of post-J.D. experience. In addition, individual offices may have special requirements depending on the type of cases the prosecutor may be designated to focus on. Only U.S. citizens can be considered for these positions,

73 For example, the Virginia Bar Association requires 12 hours of training, including 2 hours of ethics/professionalism per year. Non-compliance triggers a fine. See *supra* note 48.

74 Such training needs include, for example, trial advocacy, interviewing techniques, and jury selection.

75 The NAC is operated by the Department of Justice, Executive Office for United States Attorneys, Office of Legal Education and NDAA. The facility was built to train federal, state, and local prosecutors and litigators in advocacy skills and management of legal operations. Information on its various training programs can be found at the website of the Office of Legal Education (OLE) of the EO.U.S.A, <http://www.usdoj.gov/usao/eousa/ole.html>, and at NDAA's website, [www.ndaa-apri.org/education/nac\\_index.html](http://www.ndaa-apri.org/education/nac_index.html).

76 By statute, the Attorney General also has direction of all U.S. Attorneys and their assistants, see 28 U.S.C Secs. 514, 515, 519.

77 See United States Attorneys Manual, *supra* note 52.

and A.U.S.As generally must reside in the district to which they are appointed.<sup>78</sup> Employment is contingent upon a satisfactory background investigation conducted by the FBI.

For continuing legal education on the federal level, the vast majority of training is done at the NAC through the Office of Legal Education (OLE). This includes a variety of courses in trial advocacy and skills, training in substantive legal subject matters, and management skills.

## **2.6. Prosecutor budgets and finances**

*State level:* The level of financial independence and related reporting and accountability mechanisms are an important indicator of prosecutorial independence and transparency of operations, as well as important measures of office efficiency and accountability. The majority of local offices are funded by the county or municipality they serve, and to a lesser extent by the state.<sup>79</sup> County and state budgets are, however, dependent on their economic situations and related tax revenues collected in the county or state. Therefore, if the law allows it, local prosecutors may seek additional funding from the state or a city government within their jurisdiction. They may also develop revenue creating initiatives, such as forfeiture programs.<sup>80</sup> DAs have also learned to take advantage of initiatives offered by the federal government to advance certain crime enforcement and prevention policies. Such policies may involve enhanced domestic violence prosecution, efforts to curb drug and gun crimes, or community oriented prosecution efforts. Local prosecutors' offices can compete for federal grants to develop and implement such programs, often with the idea that the federal government will provide the start-up money and the local budget will provide funds to sustain these programs in the future.<sup>81</sup> Some DAs may even seek to reach out to the private sector to fund special services and programs or create volunteer services for certain support functions.<sup>82</sup>

The amount of money requested and allocated to a DA's office will vary with its size, the size of the population it serves, and its workload. Local prosecutors' budgets reported in 2001 ranged from \$6,000 to \$373 million.<sup>83</sup> Particularly in states where local DAs' offices receive a significant portion of the funding from the state, efforts have been made to develop some standard formula for determining an appropriate budget

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78 For a sample job announcement for A.U.S.As, see <http://www.usdoj.gov/oarm/jobs/ausaAlexandriafraud.htm>.

79 About half of the local prosecutors' offices in the U.S. receive 85% or more of their funding from the county government, and only 6% receive all their funding from the state. See Bureau of Justice Statistics, *supra* note 12.

80 See Heike Gramckow, Joan Jacoby, and Ed Ratledge, *Asset Forfeiture Programs* (1992), published by the National Institute of Justice.

81 For an overview of federal support for such programs, see the Bureau of Justice website, [www.ojp.usdoj.gov/BJA](http://www.ojp.usdoj.gov/BJA).

82 See, e.g., the website of the Multnomah County Districts Attorney's Office, [www.co.multnomah.or.us/DA/index.pnp](http://www.co.multnomah.or.us/DA/index.pnp).

83 See Bureau of Justice Statistics, *supra* note 12.

across the state.<sup>84</sup> Population size and crime rate in the office's jurisdiction provide some data that are used for estimating budget needs; still, the case and workload situation can differ significantly among offices with similar populations and crime rates, due to such factors as complexity of crimes, police activities, judicial policies, availability of alternative settlement opportunities, and prosecutorial policy. As a result, some offices have engaged in more detailed workload assessments.<sup>85</sup> Many prosecutors have learned to present budgets to fund their core prosecution functions as well as special programs and requirements. Still, prosecutors in the U.S. lag behind the courts in developing truly needs-based budgets that demonstrate workload and related cost factors as well as special program needs.

Even with much creativity, the budget allocation to the prosecutor's office may be insufficient to handle the core business of prosecution, let alone special programs. On more than one occasion, DAs have declared that they would no longer process certain cases because their budgets failed to cover all costs—and their discretionary power allows them to choose which cases to pursue.<sup>86</sup> Such declarations need to be carefully measured to gain the public's attention, in order to pressure the local or state funding agency to increase the budget for the office. It is a legitimate means in dire budget situations, but it can backfire.

Budget requests and presentations are made by the DA directly to the funding authority. The process for presenting the budget differs among states and counties. Some limit the process to direct submission to and negotiation with the state or county executive, while others allow presentations to the state legislature or county board or a combination thereof.<sup>87</sup> Independently of this process, DAs must provide justifying information to support their budget requests, the details of which also differ among funding authorities. Some states may provide for an appeal to the court if the requested budget amount is not provided, on the basis that the budget authority acted improperly and arbitrarily.<sup>88</sup>

Well-developed explanations and justifications of prosecutor budgets are key to gaining support from local and state governments and legislatures. Determining an accurate budget is an increasingly technical process; successfully getting the desired budget approved is still a political process.

In states where state funding represents a significant portion of their budget, local DAs rely increasingly on the assistance of a state association of DAs, where such exists. These DAs' associations or Prosecution Coordination Commissions may pro-

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84 See, for example, American Prosecutors Research Institute, *Workload Study for the State of Tennessee* (1999).

85 For a description of different methodologies to assess workloads in prosecutors' offices, see Heike Gramckow, *Estimating Staffing Needs for the Justice Sector* (2002), published by the National Center for State Courts.

86 See Joan Jacoby, *The American Prosecutor's Discretionary Power*, THE PROSECUTOR (November/December 1997).

87 Three basic models of county governments exist in the U.S.: they can be led by an elected commission, by a commission/administrator, or a council/executive. If the prosecutor's jurisdiction includes an independent city, the city government is generally headed by an elected mayor.

88 See Robert Johnson, *supra* note 9.



vide a range of support services to individual DAs' offices, including taking on some or all of the budget development, presentation, reporting, and lobbying responsibilities to the state legislature. The Tennessee District Attorneys General Conference, for example, is responsible for almost all budget development and management tasks for individual DAs' offices in that state, and presents the budget requests and reports to the Tennessee Department of Finance and Administration for inclusion in the executive's budget request to the state legislature.<sup>89</sup> In most states, however, these tasks are left entirely to the individual DAs' offices.

Any office that receives state or county funds must abide by the relevant accounting and auditing requirements. Increasingly, state (and local) laws require that budget requests be tied to outputs or goals, to provide some performance related accountability. Some prosecutors are concerned that unless great care is taken in establishing performance measures, any such standards could adversely impact the independence and impartiality of their offices.

Once the budget is approved, the budget authority has no say in how the DA's office applies the funds, unless specific line items were designated for specific activities or initiatives. The funding authority may also be permitted to adjust the funding level throughout the year if the overall budget situation changes significantly. Such adjustments must, however, be across the state or county budget, or at least the justice sector, and cannot limit only the DA's funding.

*Federal level:* On the federal level, the U.S. Attorney's budget is part of the DOJ's budget, which is presented to Congress as part of the President's budget. The main responsibility for collecting budget information and presenting it to the Attorney General rests with the EO.U.S.A. The GPRA law<sup>90</sup> requires that the budget be tied to performance goals established for all federal offices.

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### **III. Functions and Powers of Prosecutors in the Criminal Process**

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Prosecutors in the U.S. have exclusive authority to bring criminal prosecutions. But they can also be involved in investigations, play a key role in providing services to victims and witnesses, make sentencing recommendations, and have input into parole and probation decisions. In 2001, nine out of ten local prosecutors' offices reported handling misdemeanor cases in addition to felonies. In addition to handling non-criminal matters,<sup>91</sup> 84 percent had jurisdiction over traffic violations and 89 percent

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<sup>89</sup> See Tennessee District Attorneys' General Conference, [www.tndagc.com](http://www.tndagc.com).

<sup>90</sup> See above, Section 2.4.

<sup>91</sup> 54% reported that they represented the local government in civil cases, and 48.6% handled child support enforcement. See Bureau of Justice Statistics, *supra* note 12.



handled juvenile matters. At the federal level, in addition to civil matters,<sup>92</sup> U.S.AOs actively support cooperation and coordination between all levels of law enforcement, including intelligence and resource sharing, problem solving, and training, through Law Enforcement Coordinating Committees (LECC)<sup>93</sup> and other task forces. The offices further assume a leadership role in the area of victims' services and victim's rights through their work with state and national advocacy groups and their own victim-witness assistance programs.

The functions of state and federal prosecutors in the criminal process are quite similar, with the exception of the DAs' offices' ability to conduct their own investigations and the fact that DAs' offices handle a significantly broader spectrum of crimes and have a much larger caseload and fewer resources. Overall, prosecutors in the U.S. function as gatekeepers to the criminal justice system.<sup>94</sup> Their role and discretion allow them to keep cases that are not substantiated by admissible evidence out of court, and to ensure that cases not in the public interest are not sent to court and that more important cases are investigated even if law enforcement does not pursue them. They must ensure that the adversarial system is balanced by not merely focusing on prosecution and seeking convictions, but also looking for exculpatory evidence and assisting witnesses and victims. They suggest appropriate sentences and monitor decisions to release.

While it is beyond the scope of this report to outline all prosecutorial responsibilities and functions in the criminal justice process, the following sections outline their key functions.<sup>95</sup>

*The investigation phase:* DAs' offices can request but not require investigative activities from law enforcement agencies, and they do not have supervisory authority over police investigative activities.<sup>96</sup> They may, however, provide legal guidance, particularly for conducting investigative activities that required judicial approval, such as arrest and search warrants and wiretaps. The laws vary among the U.S. states, but such warrants and requests for electronic surveillance generally require judicial review (except in cases of emergency, for which judicial review must follow, usually within 48 hours). Given the often complex and quite restrictive exclusionary rules, which can severely limit admissibility of evidence if the legal requirements for its collection were not fully met, a prosecutor's legal advice is important to ensure that law

92 U.S.AOs represent the U.S. in civil litigation. This includes defending the government against civil lawsuits, such as tort cases and contract disputes. It also includes representing the government in affirmative civil actions, including injunctive actions or other civil enforcement cases. A detailed description of these proceedings may be found in the U.S. Attorneys' Manual, *supra* note 52.

93 LECCs were developed to enhance cooperation and coordination among local, state, and federal law enforcement officials. LECCs are also responsible for assisting in enhancing community relationships with law enforcement, acting as a point of contact for law enforcement agencies, and sponsoring or co-sponsoring free or low-cost training courses for law enforcement officials. In addition, LECCs are involved in a range of special crime prevention and enforcement activities.

94 See Joan Jacoby, *The American Prosecutor in Historical Context*, THE PROSECUTOR (July/August 1997).

95 For more detailed information on the role and responsibility of prosecutors in criminal proceedings, see NDAA Standards, *supra* note 36.

96 One exception is New Jersey, where prosecutors provide direction to investigative agencies.

enforcement actions are not wasted. Due to the complexity of statutes and case law on electronic surveillance, prosecutors will almost always be involved in writing and submitting wiretap affidavits and requests.<sup>97</sup>

The role of the prosecutor's office in these instances is to ensure that these intrusive investigative measures are legally sound, so that the court provides authorization, the investigation is lawful, and investigative efforts are not tainted. These activities require close cooperation between police and prosecution. For example, in order to ensure that a search of a suspect's home is conducted lawfully, police will often not only have a set of detailed procedural guidelines (often developed with the legal advice of the prosecutor's office),<sup>98</sup> but will request legal advice right before, and sometimes while, the search is conducted. This requires an assistant DA with knowledge of such operations to be on call. In order to provide this support to law enforcement agencies, larger offices in urban areas assign prosecutors to be available 24 hours a day, seven days a week.

Lack of investigative supervision does not mean that limited or nonexistent police investigative capacity would prevent the prosecutor's office from pursuing certain cases. Some DAs' offices have established their own investigative units to bolster the investigative capacities of the law enforcement agencies serving their jurisdictions. These units may be created to pursue cases that law enforcement agencies lack the manpower or the interest to investigate. Sometimes, keeping investigations apart from the executive branch-controlled law enforcement agencies may be the reason for establishing a special investigative unit in a DA's office.<sup>99</sup> DAs' offices may also take the lead in or be part of a local or regional agency task force that involves prosecutors and investigators in pursuing specific crimes. In addition, a DA may bring a matter before a grand jury, which may compel testimony and commence a prosecution by issuing an indictment.<sup>100</sup>

Prosecutors generally do not simply accept statements made to the police by victims, witnesses, and suspects, particularly in felony cases. They frequently interview

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97 The wiretap laws require, for example, a judicial order for the interception of call content, based on a finding of probable cause; such a judicial order may only be provided for a specific period of time and specific suspected criminal activity. On both the federal and state levels, a request for wiretap authorization cannot be made to a judge without first undergoing a rigorous internal review process by lawyers **extensively familiar with the wiretap requirements and case law. The quality of submissions to judges for wiretap authorization is therefore quite high, and most applications for authority to conduct electronic surveillance are approved.** For statistics on wiretap authorizations for 2001, see the 2001 Wiretap Report released by the **Administrative Office of the United States Courts**, available at <http://www.uscourts.gov/wiretap01/contents.html>.

98 Many DAs' offices provide the relevant law enforcement agencies with model formats for warrants and train officers in the laws applicable to the issuance and execution of different warrants, especially if electronic surveillance is involved.

99 H. P. Gramckow, E. J. Jacoby, and E. C. Ratledge, *Prosecuting Complex Drug Cases. The Challenge for Local Prosecutors* (1993), published by the National Institute of Justice.

100 As on the state level, one significant investigative tool for A.U.S.As is the grand jury. Except in the case of misdemeanors and instances where the alleged offender waives the right to a grand jury indictment, the U.S. Attorney presents the evidence to a grand jury, which can conduct additional investigations. In complex cases, the A.U.S.A may ask the grand jury to issue subpoenas for evidence, documents, and/or testimony from witnesses.

them themselves in order to inform their own filing and charging decision, provide information for plea bargaining, develop their trial strategy, and prepare victims and witnesses for trial.

*Pre-trial detention and release:* The decision to place a defendant in pre-trial detention is a judicial decision. The laws generally favor release of a defendant pending determination of guilt or innocence. At the same time, these laws seek to balance this with the need to protect the public interest. The states have varying but strict requirements requiring suspects to be either charged or released within a relatively short time period. Pursuant to a United States Supreme Court decision, a judge must approve any detention beyond 48 hours upon a demonstration of probable cause showing that the person committed a crime.<sup>101</sup> While some variations in the justification for pre-trial detention exist among the states, they generally include danger that the defendant will flee, commit another crime, seek to intimidate witnesses, or otherwise unlawfully interfere with the orderly administration of justice. They can also include the danger that the defendant will harm him/herself.<sup>102</sup> It is generally recommended that prosecutors (and a pre-trial agency, where one exists)<sup>103</sup> be involved in the inquiry into the facts relevant to pre-trial release, such as the nature of the current charge, past criminal record, facts indicating lack of ties to the community, likelihood of flight, and facts indicating the possibility of violations of laws if released. The detention hearing will generally also explore the possibility of conditional release.<sup>104</sup> In addition, the court can decide to release the defendant on money bail. The burden of proof is on the prosecutor to establish the need for denying release or setting bail with appropriate conditions.<sup>105</sup>

*Charging and other pre-trial proceedings:* Within the framework of office policies, assistant prosecutors have the discretion to decide under which charge(s) to file a case in court or to decline prosecution. The prosecutor exercises this discretion in screening cases to determine when prosecution is not justified, not in the public interest, or not in the interest of justice. Prosecutors may decline to prosecute a case without a reason, and generally without the possibility of review. As a practical matter, such a decision must be based on reasons that are provided to and understandable by victims, police, and the public, and that understanding is sought by the prosecutor.

101 *Riverside v. McLaughlin*, 500 U.S. 44 (1991).

102 Similarly, under federal law, the release and detention of defendants pending judicial proceedings is governed by the Due Process Clause of the Fifth Amendment, the Excessive Bail Clause of the Eighth Amendment, and the Bail Reform Act of 1984. The latter provides procedures to detain dangerous offenders, as well as offenders likely to flee pending trial or appeal. See *United States v. Salerno*, 481 U.S. 739 (1987).

103 For more information about pre-trial agencies, see Pretrial Services Resource Center, [www.pretrial.org](http://www.pretrial.org).

104 Conditional release may involve reporting requirements, release into the custody of a reliable person, supervision, including electronic supervision, and activity restrictions.

105 For more information on the bail system, see Spurgeon Kenney and Allan Henry, *Commercial Surety Bail: Assessing its Role in the Pretrial Release and Detention Decision* (1996), published by the Pretrial Services Resource Center. In 2000, an average 32% of defendants were released on the state level on financial bond and 6% on unsecured bond. See Bureau of Justice Statistics, *Pretrial Release and Detention Statistics* (2002). On the federal level, 48% of defendants were released during the pre-trial stage, 18.2% of them on financial bond and 47.2% on unsecured bond. See John Scalia, *Federal Pretrial Release and Detention, 1996* (1999), published by the Bureau of Justice Statistics.

To do otherwise would invite the DA's defeat at the next election. The reasons given may be technical, such as absence of proof on critical elements, or justified by the prosecutor's obligation, above all other considerations, to seek justice.<sup>106</sup> Once a prosecution has been commenced, the judgment to discontinue the prosecution is again that of the prosecutor. Often the elected prosecutor requires that assistants justify their decision not to prosecute in a written document for review by their superior, and that the explanations be given to the victims, police, and public.

Neither federal nor state courts have the authority to review decisions not to prosecute. Courts may, however, dismiss cases brought before them that are not supported by sufficient evidence. They have no authority to order further investigation. An assistant prosecutor's decision not to prosecute can be appealed to the DA. Otherwise, the victim is limited to filing a civil case for damages incurred as a result of the incident.

An alternative available to prosecutors is to divert a case into special programs that may involve community service, treatment, or voluntary payment of restitution to the victim. If successfully completed, the case will be dismissed by the prosecutor's office and no criminal record established. Such programs may be initiated by, and are largely under the control of, the prosecutor's office. They may take the offender before a case is filed in court, or may be court-connected programs that will commence after charging and merely defer prosecution, with the approval of the court.<sup>107</sup>

Depending on the jurisdiction, a number of pre-trial hearings and events must be scheduled once prosecution commences. First appearance hearings before a judge or magistrate are generally to be held "without unnecessary delay."<sup>108</sup> Most jurisdictions do not require the presence of the prosecutor or defense council. Some jurisdictions allow defendants to plea guilty at the first court appearance,<sup>109</sup> however, and it is therefore recommended that the prosecutor be present. In some jurisdictions, particularly those without grand jury indictment procedures, the first time defense counsel and prosecutor are present is the probable cause hearing. In most jurisdictions, this hearing must be scheduled within 14 days of the first appearance. The purpose of this hearing is to determine probable cause for the offenses charged.<sup>110</sup> In other jurisdictions, the prosecutor may choose to use the grand jury for further investigations and for indictments. The use, composition, and responsibility of grand juries differ significantly among the states. Some rely largely on the prosecutor's information in initiating charges; other states require indictment by a grand jury even for serious

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106 NDAA Standards, *supra* note 36, Standard 1.1.

107 For a short overview of diversion programs, see Center on Juvenile and Criminal Justice, *Diversion Programs: An Overview*, at [www.ncjrs.org/html/ojjdp/9909-3/div.html](http://www.ncjrs.org/html/ojjdp/9909-3/div.html).

108 The definition varies among jurisdictions, depending on the decisions that must be made. If the accused is in pre-trial detention, a 48- or 72-hour rule must be adhered to in most jurisdictions. See NDAA Standards, *supra* note 36, Standard 46.1.

109 An early plea is not merely important for timely processing; it may also be in the interest of the defendant not to prolong the proceedings, particularly if pre-trial detention is ordered. In other cases, defendants charged, for example, with traffic offenses where another person has been injured may plead guilty to these charges, thereby establishing a double jeopardy bar to any subsequent filing of more serious charges if the injuries worsen. See *Grady v. Corbin*, 11 S.Ct. 2084 (1990).

110 See NDAA Standards, *supra* note 36, Standard 47.1-6.

misdemeanors. The use of the grand jury allows the prosecutor to draw upon another independent authority for additional independent review of facts.

If the accused is indicted, the next hearing will generally be the arraignment. The purpose of this hearing is for the court to appoint a defense counsel if this has not already happened, take a plea if that is desired, establish release conditions and bail, and set a trial date. The role of prosecutors at this hearing is not merely to weigh in on the court's decisions, but to take this opportunity to discuss with defense counsel any discovery requests and pre-trial motions<sup>111</sup> that may be made, with the aim of expediting the procedures. For the same purpose, courts schedule pre-trial conferences whenever a trial is likely to be protracted or unusually complicated. Matters usually considered during such conferences include stipulating facts that are not in dispute, identifying documents and exhibits submitted by the parties, use of juries and *voir dire*, and plea agreements.<sup>112</sup>

The role of the prosecutor in all of these events is to ensure that all evidence is made available and is admissible, the rights of the defendant and the victim are protected, and the most efficient processes are applied. Since several court events may have to be scheduled and attended by all parties before trial finally takes place, the goal of expediting the process may not be initially obvious. However, each step permits clarification and agreement on issues and plea acceptance; this reduces the likelihood of a long and complicated (and generally costly) trial, and in the vast majority of cases even eliminates the need for trial. Avoiding delay and cost are important concerns for the court and the prosecution. Prosecutors play a significant role in ensuring that court schedules are set to allow both parties reasonable preparation time, avoid unnecessary processing steps, and eliminate delaying tactics by any of the parties.<sup>113</sup>

*Plea bargaining, trial, and sentencing:* Where it appears that the interest of the state in the effective administration of criminal justice will be served, the prosecution, while under no obligation to negotiate any criminal charge, may engage in plea negotiation for the purpose of reaching an appropriate plea agreement. Prior to negotiating, the prosecution considers factors such as the seriousness of the crime and the defendant's prior record, attitude, and behavior.<sup>114</sup>

If no plea agreement can be reached, or if the prosecutor does not offer a plea, the prosecution and defense prepare for trial and participate in the selection of jurors. The constitutional guarantee of trial by jury in criminal cases can be waived by the defendant. In the interests of efficiency, states can determine the size of juries re-

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111 The American system allows a number of motions to be made by either party to dispose of matters that would otherwise complicate or prolong the trial. These include schedules for completing discovery, rulings for disclosure, court rulings on suppression of evidence, etc., as well as setting dates for a pre-trial conference and accepting the defendant's plea, if one is offered. See NDAA Standards, *supra* note 36, Standards 50.1-5.10.

112 For more detail, see NDAA Standards, *supra* note 36, Standards 51.1-51.3.

113 For more information on delay reduction, see David Steelman, John Goerd, and James McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium* (2000), published by the National Center for State Courts.

114 See NDAA Standards, *supra* note 36, Standards 66.1-72.1.

quired for different types of cases.<sup>115</sup> The process of selecting a jury in the U.S. is one of the many examples of checks and balances built into the criminal justice process. Both prosecution and defense engage in this process, which has developed into an art, if not a science.<sup>116</sup>

Procedural rules outline the sequence in which the prosecution and defense present their arguments and evidence, present and examine witnesses, and present their conclusions to the jury during the trial. The prosecution carries the burden of proving beyond a reasonable doubt that the defendant is guilty. It is also the prosecutor's responsibility to ensure that exculpatory evidence is presented. The procedural rules are designed to give both parties equal standing throughout the trial, and it is the court's duty to ensure that this parity is respected. While it is the role of the prosecutor and the defense to examine witnesses, it is the judge's role to control this process.

After a defendant is found delinquent in juvenile court or guilty in adult court, the prosecutor must make a sentencing recommendation to the judge regarding supervision, probation, and/or incarceration. Such recommendations must be well grounded and based on a pre-sentence investigation by the probation department, if available. The probation officer's report usually contains a wide range of information useful for sentencing purposes.<sup>117</sup> To make sensible sentencing recommendations, the prosecutor should also be familiar with the range of correctional options available.

*Appeals:* State laws permitting prosecutorial appeal vary, and not all local prosecutors engage in appeals. In some states, the Attorney General may be responsible for representing the state in appeal proceedings; in others, it may be the Statewide Prosecutor Coordinator.<sup>118</sup> The reason for this "division of labor" is that appeals, in general, are very time consuming, requiring thorough review of the entire case record, the filing of a brief and reply brief and, in most cases, participation in an oral argument, which for many offices requires travel to the seat of the relevant appeals court. Regardless of where the responsibility for appeals resides, prosecutor appeals can generally be filed without the concurrence of the court for judgments that dismiss indictments on substantive grounds, pre-trial orders that terminate or impede prosecution, trial orders of dismissal or directed verdicts upon a question of law, and judgments involving sentences deemed grossly inadequate.<sup>119</sup> In practice, prosecutors are careful in reviewing options to appeal and weighing the effort involved. Because of the diversity among prosecutors' offices and their decentralization, no data exists on the "average" rate of appeals pursued. Since over 90 percent of all cases are disposed of by pleas, however, and because of the effort involved, the rate of appeals versus cases filed must be low. Reported numbers of appeals on the federal and state level support this assumption.<sup>120</sup>

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115 This follows the U.S. Supreme Court's decision *Williams v. Florida*, 399 U.S. 78 (1969), in which the court ruled that the constitution did not require a 12-member jury.

116 For more information on jury selection, see Thomas Munsterman, Gene Thomas, et al., *Jury Trial Innovations* (1997), published by the National Center for State Courts.

117 Ehrensaft, *supra* note 63.

118 For example, in New York state for the latter.

119 See NDAA Standards, *supra* note 36, Standards 89.1-89.7 for more detail.

120 In fiscal year 2005, 11,007 criminal appeals were filed on the federal level. See *United States At-*



*Post sentencing:* Prosecutors have the right to attend probation revocation and termination hearings and provide input based on information on the offender collected by their office. Similarly, prosecutors seek to provide input to parole board hearings. While these boards are independent and have broad discretion in their decisions to grant parole or early release, many jurisdictions require advance notice of such hearings and allow the prosecutor to be heard. Prosecutor participation in these hearings is not required and is left to the discretion of the office. When offenders deemed particularly dangerous are involved, prosecutors generally appear at the hearing or at least provide a written statement.

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## IV. The Relationship Between the Prosecution Service and Other State Structures

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### 4.1. Relationship with the legislature

*State level:* The state legislature has no role in the nomination, selection, or removal of DAs or individual prosecutors and no involvement in reviewing their performance. The legislature, however, makes decisions about the structure of the prosecution authority, such as length of term of office and how funds are provided, and legal jurisdiction, that is, the authority to prosecute certain crimes.

The legislature also influences the operations and range of discretion of the prosecutors in its state through the legislative process. It may enact new laws criminalizing or decriminalizing certain behavior and may, through sentencing guidelines, set the range and scope of penalties that prosecutors can seek. Many DA offices not only try to keep abreast of legislative trends, but also seek to influence the legislative process to ensure that new laws reflect the needs of their communities and offices. Larger DAs' offices in particular tend to actively engage with the legislature by sponsoring new legislation or commenting on pending drafts.

It is within the power of any state legislature to request information from private persons and public officials if this information is essential for its legislative work. Accordingly, DAs may be requested to report to the legislature on individual cases and will generally comply if asked. However, since most DAs are independent, they are not required to report to the legislature on their performance, and requests for such reports are very rare.

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*torneys' Annual Statistical Report, supra* note 28. On the state level, the number of appellate court filings reached 278,000 in 2002. See National Center for State Courts, *Examining the Work of State Courts* (2003).



The state legislature may also request independent investigations by a grand jury in states where this mechanism exists. In other states, Special Investigative Commissions have been established to pursue certain types of cases at the request of the legislative branch.<sup>121</sup>

*Federal level:* On the federal level, in contrast, the Senate has significant influence on the President's appointments of U.S. Attorneys.<sup>122</sup> Traditionally, when there is a vacancy, or at the beginning of a new presidential administration, the senior Senator of each state from the same political party as the President will submit his/her suggestions to the President for nomination for U.S. Attorney for the judicial districts in that Senator's state. The process and criteria by which the candidates are chosen are within the Senators' discretion. This means that the two Senators of each state have significant decision-making power over who will be the U.S. Attorney(s) serving their state. Only in the most blatant instances of unsuitability have nominees been rejected by the President.

Reports on performance of the U.S.AOs are included in the AG's report to Congress. The U.S. Congress also has the right to request reports on individual cases. As a function of its legislative role under the Constitution, Congress can compel appearances and information from private persons and organizations and executive branch officials and agencies. Congress does not need to explain or justify its choice of subjects for hearings and investigations.<sup>123</sup> Accordingly, the U.S. Congress has the right to hold independent investigations on the activities of the prosecution service and individual prosecutors. In practice, Congress rarely holds investigative hearings on individual prosecutions, focusing instead on whether the priorities and activities of the DOJ comport with the spending directives set by Congress. As a result, decisions on the allocation of prosecution resources at the federal level are not made in a vacuum by the executive branch alone. Congress has a significant impact in this area.

To conduct investigations, Congress has established special standing and ad hoc committees. It can also request, but not require, that the Attorney General appoint a special counsel to investigate certain type of cases if the DOJ may have a conflict of interest, for example in the investigation of high ranking administration officials.

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121 For example, in New Jersey, a State Commission of Investigation (SCI) was created in 1968 to address the intensifying problem of organized crime and political corruption. The Commission consists of four commissioners, two appointed by the Governor and one each by the President of the state's Senate and the Speaker of New Jersey's General Assembly. Supported by staff attorneys and investigators, it may conduct public and private hearings, compel testimony and the production of other evidence by subpoena, and grant limited immunity from prosecution to witnesses. Since the Commission does not have prosecutorial functions, it is required to refer information suggesting possible criminal misconduct immediately to the New Jersey Attorney General. See New Jersey State Commission of Investigation, [www.state.nj.us/sci](http://www.state.nj.us/sci). Similarly, the New York State Commission of Investigation undertakes investigations of corruption, fraud, and mismanagement in New York State and local government. New York State Commission of Investigation, [www.sic.state.ny.us](http://www.sic.state.ny.us).

122 28 U.S.C. Sec. 541.

123 In *Watkins v. United States* (1957), the Supreme Court stated: "The power of the Congress to conduct investigations is inherent in the legislative process. The power is broad. It encompasses inquiries concerning the administration of existing law as well as proposed or possibly needed statutes. It comprehends probes into departments of the federal government to expose corruption, inefficiency, or waste."

This happens rarely and generally involves highly sensitive political issues and the highest state figures.<sup>124</sup>

While Congress' power of inquiry is broad, it is not unlimited. The Supreme Court has established that the power to investigate may be exercised only "in aid of the legislative function," and cannot be used to expose for the sake of exposure alone.<sup>125</sup>

## 4.2. Relationship with the executive

*State level:* The independent state prosecutors are not controlled by the executive in any respect. However, the fact that their budgets are ultimately dependent upon the decisions of the county/city/state executive, concerns over justice system effectiveness, and the desire to be reelected provide a number of incentives to coordinate prosecutorial policies with other justice system agencies and the executive branch. Good relations with the executive branch on the county or state level are particularly essential during budget times. It is to the benefit of the prosecutor's office to work in concert with the executive branch when it comes to law enforcement and legislative initiatives. Therefore, DAs and their deputies often serve on state or countywide coordinating councils for the criminal justice system or on special committees to pursue enforcement or crime prevention issues.

These communications, together with communications with victims and citizen groups, are not binding but are considered in prosecutorial decisions, whether for general policy setting or for individual cases. Working together with others in important statewide law enforcement and crime prevention initiatives means being able to leverage resources and increase coordination for efficiency. Such initiatives frequently gain importance during an election year for any elected official, including an elected DA.<sup>126</sup> DAs who do not consider public sentiments and law enforcement and political trends on the county or state level are likely to face difficulties when coordination with others is needed or when seeking reelection. More than a few DAs have faced the opposition of, for example, the local Fraternity of Police during election time because their prosecution policies conflicted with policing policies.

Most DAs' offices handle more than criminal prosecutions; they may also provide legal advice to the relevant executive branch agencies or work closely with other investigating agencies, such as child protection agencies. Thus their need for coordination with these entities goes beyond the operational aspect, and can involve legislative advocacy to support those activities.

*Federal level:* U.S.AOs are part of the executive branch. They follow the directions of

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124 The Whitewater investigations against President Bill Clinton were one such example. For more detail on the appointment of special counsels, see Leslie Bennett, *One Lesson from History: Appointment of Special Counsel and the Investigation of the Teapot Dome Scandal* (1999).

125 Morton Rosenberg, *Investigative Oversight: An Introduction Into the Law, Practice and Procedure of Congressional Inquiry* (1995), published by the Congressional Research Service.

126 See Simmons, *supra* note 11.

the Attorney General, but also set their own policies. They receive significant management support from the EOUSA and generally aim to develop good working relationships with the DOJ and other U.S. Attorneys' offices.

Although they are independent of one another, U.S.AO and federal investigative agencies in each district work closely together due to the complexity of many federal statutes and investigations. The U.S.AO can request, though not require, other agencies to conduct additional investigations; prosecutors will provide legal advice, but have the discretion to decide whether or not to pursue prosecution. Similar cooperation occurs in civil cases involving other U.S. government agencies.<sup>127</sup> U.S. Attorneys may also recommend to the AG changes in policies and procedures to enhance the activities of other agencies that refer cases to their offices, but they cannot compel other agencies to take specific actions.

### **4.3. Relationship with the police and other investigative organs**

*State level:* The executive branch agency with which prosecutors have the most interaction is the police. Depending on the county or judicial circuit their office serves, DAs may receive cases from one or more law enforcement agencies. For example, the police agency serving Brooklyn County, NY, is the New York City Police Department, and it is the primary law enforcement agency with which the Brooklyn DA's office works. The DAs' offices in most counties or judicial districts, however, must work with a number of law enforcement agencies. For example, the DA's office in Multnomah County, Oregon, receives the majority of cases from the Portland Police Department, but other cases may be brought by the Multnomah County Sheriff's Department, with county-wide jurisdiction, or a number of police agencies that serve smaller independent cities within the county, as well as the Oregon State Police.

While most local and state police in the U.S. are not under the supervisory authority of the prosecutor's office,<sup>128</sup> DAs' offices generally strive to develop good cooperative relationships with their law enforcement counterparts, which is crucial to ensuring successful investigations that produce evidence that holds up in court. Prosecutors need competent investigations in order to prosecute successfully, and police want their cases prosecuted. Still, there is a natural tension between these agencies. DAs, police chiefs, and sheriffs have found that increased communication between police and prosecutors improves understanding and cooperation, and is essential to ensuring efficient use of each agency's resources. Proactive communication by prosecutors with law enforcement officers means less prosecutor time in court, more effective prosecutions, and, in turn, less time spent by officers in court awaiting appearances for hearings that are frequently postponed. It is also key to ensuring that each agency understands why the other has established specific policies. For example, if a police

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<sup>127</sup> The civil divisions of U.S. Attorneys' offices provide litigation support in matters involving Social Security, commercial litigation, representing the federal government in tort litigation, bankruptcy, litigation involving federal prisoners, and immigration cases.

<sup>128</sup> One exception is the state of New Jersey.

agency—possibly as a result of community complaints—decides not just to step up patrol efforts in red light districts, but to increase arrests of prostitutes and their customers, the DA's office must be informed and must agree on the correctness of this enforcement policy. Otherwise, it may dismiss all such cases, rendering the effort useless. In countries where neither police nor prosecutors have the discretion to drop or pursue cases, this may not be an obvious point of friction, although the same issues often also undermine interdepartmental cooperation and effectiveness in those countries. It is generally in the interest of both agencies to come to a common understanding on such policies; however, particularly at election time, policy differences between the independent DA and the executive branch, of which the police is a part, may create polarization.

Also, since DAs' offices are independent, and the law enforcement agencies that serve in their jurisdiction are part of the executive branch, neither has any direct influence on appointments, training, work assignments, promotions, or disciplinary actions related to officers of the other agency. However, in jurisdictions where police and prosecutors work well together, there may be coordination on all these issues, and each agency may seek the other's input on them. The agencies may also work closely together on training issues.<sup>129</sup>

To enhance the relationship with police, many prosecutors' offices establish special liaison functions. For example, according to a survey conducted in Minnesota in 1995, nearly 48 percent of county attorney's offices and 44 percent of city prosecutor's offices in that state had established a formal liaison, usually just verbally or by brief letter, with their local law enforcement agencies for communicating information such as the status of cases.<sup>130</sup> These liaison officers ensure regular meetings and communication at all agency levels. It is less usual, especially in smaller offices, to establish more formal or permanent coordination mechanisms, such as Memoranda of Understanding (MOUs) that outline standard operating and communication procedures, or task forces.

Where a multi-agency task force has been created to more effectively pursue certain types of cases, the DA's office may or may not have directive powers over the investigators from other agencies participating in the task force.

In each state, in addition to local and state police, a number of other agencies—differing from state to state—have investigative powers. Most states provide for an elected sheriff in each county. They are the police authority in unincorporated areas and townships, and have concurrent police authority with city police in cities. In some counties, the Sheriff's Department functions as the main law enforcement agency. Other agencies of the executive branch, such as the state's environmental enforcement agency, housing and zoning, family services, and the like, have investigative powers related to their areas of authority. Generally the investigative jurisdiction of each agency is defined by geographic boundaries and subject matter. Agencies may

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129 For example, about 85% of county attorney's offices and 47% of city attorney's offices in Minnesota offered training to peace officers in 1995. Minnesota Office of the Legislative Auditor, *supra* note 38.

130 *Id.*

designate a liaison to ensure communication and coordination among agencies with related responsibilities, or create combined task forces that allow for a stronger response from all involved agencies.<sup>131</sup>

DAs' offices generally also strive to develop good working relations with any agency that has investigative powers over cases their office may prosecute or litigate. This includes maintaining good relations with federal investigative agencies and the U.S. Attorney's office responsible for their jurisdiction. Larger DAs' offices are generally members of the LECC<sup>132</sup> and other local and regional task forces. DAs' offices concerned with more holistic approaches to addressing crime problems will frequently participate in—or even spearhead—task forces or coordinating councils that involve not just law enforcement but other regulatory agencies and organizations, and even business councils and neighborhood organizations.<sup>133</sup>

In states where they are available and have the authority to investigate, grand juries are another institution upon which prosecutors can draw for investigations.

*Federal level:* Similarly, federal prosecutors and federal criminal investigative agencies, while part of the federal executive branch, are entirely independent of each other. However, there is a high degree of cooperation between federal law enforcement agencies and the U.S.AOs. This cooperation is seen in work on various task forces, coordinating initiatives, and training provided by U.S.AOs to federal agents.

While federal prosecutors do not conduct their own investigations, in complex cases they work closely with the federal investigative agencies in helping direct the course of investigations. This can include interviewing witnesses with the federal agents and determining appropriate investigative actions. A U.S.AO may also house a Federal Task Force that includes investigators from other agencies.

Liaison officers, MOUs, and task forces are established to ensure communication and coordination. In addition, U.S. Attorneys take the lead in the LECCs that bring all law enforcement and prosecutorial agencies operating in a specific geographic area together. Still, all these mechanisms are only as good as the individuals and agencies that participate in them. Differences in policies or operations among department heads as well as personalities can do much to impede or promote interagency cooperation and communication.

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131 See, e.g., California State University, Sacramento, *Evaluation of Multi-Jurisdictional Drug Task Forces in California* (2003), published by California Office of Criminal Justice Planning.

132 See *supra*, note 93.

133 For example, to improve reporting, investigation, and prosecution of child abuse cases and enhance services to the victims, the Multnomah County (Portland, Oregon) DA convened a policy group composed of the Children's Services Division, Portland Police Bureau, Multnomah County Sheriff's Office, Juvenile Court, Gresham Police Department, several area hospitals, the Multnomah County Education Services Division, representing area schools, and the Multnomah County Health Division to develop protocols for the operation of the group members. The effort has led to improved communication protocols, increased reporting, and greater cooperation among the various agencies to better protect children from abuse. See <http://www.co.multnomah.or.us/da/mdt/index.php>.

A number of agencies on the federal level have criminal investigative authority over certain types of cases. Not all federal investigative agencies that conduct criminal investigations are housed within the DOJ with the federal prosecutors. The Secret Service (which handles financial and computer crimes in addition to its protective duties) and the Customs Service, previously in the Treasury Department, are now both in the Department of Homeland Security, as is the enforcement arm of the Immigration and Naturalization Service, previously part of the DOJ. The criminal agents in the Internal Revenue Service report to the Secretary of the Treasury. Postal inspectors with jurisdiction over mail fraud are part of the U.S. Postal Service. Criminal investigations are also conducted by personnel within various regulatory agencies, including the Securities and Exchange Commission and the Environmental Protection Agency, and such executive departments as Agriculture, Labor, and Interior. Even within the DOJ, special agents in the FBI, Drug Enforcement Administration, and Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) report to their own agency officials, with only the Attorney General and Deputy Attorney General possessing hierarchical authority over them.<sup>134</sup>

Overlap of responsibilities is limited and generally addressed through agency policies and MOUs. The LECCs provide one coordination mechanism, along with district-wide or regional task forces involving federal, state, and local law enforcement and prosecution agencies. Still, unclear or duplicate responsibilities can lead to lack of coordination. Since 9/11, significant resources have been committed to this problem, with great emphasis placed on better communications and coordination between federal agencies.<sup>135</sup> Coordination mechanisms similar to those on the state and local levels have been established on the federal level. Liaison functions, task forces, inter-agency agreements, and regular coordination meetings are conducted at all levels of the agencies' hierarchies. Still, none of these efforts are foolproof.

#### 4.4. Relationship with the judiciary

While prosecutors and other lawyers representing clients in courts are referred to as "officers of the court,"<sup>136</sup> they do not belong to the judiciary. Their budgets are separate from those of the state courts, and if they have investigative powers, they may seem more like enforcement agencies. On the federal level, prosecutors are a part of the executive branch, their budgets are part of the DOJ, and they are clearly an executive branch agency. But how does one classify local prosecutors who are independently elected and belong neither to the executive nor the judiciary? The United

134 See Daniel Richman, *Prosecutors and their Agents, Agents and their Prosecutors*, 103 COLUMBIA LAW REVIEW 750-831 (2003).

135 For example, reorganization under the Homeland Security Act shifted the BATFE from the Treasury Department to the DOJ to address such gaps.

136 See, e.g., the Preamble to the North Carolina Revised Rules of Professional Conduct, which refers to "A Lawyer's Responsibilities" and states, "A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice." RRPC 0.1(1).



States has a history of public prosecution dating back 300 years.<sup>137</sup> One could argue that prosecutors are a branch in themselves. Others have made the case that prosecution is the archetypical executive function.<sup>138</sup> Considering the tradition of independent state level prosecutors in the U.S. who engage in investigative activities only when law enforcement agencies lack the capacity to do so, and otherwise function as officers of the court, it appears more logical to view them as part of the judiciary, if not another “branch” of government altogether.

Notwithstanding this situation, the relationship between prosecutors and the judiciary does not much vary on the state or federal level. The independence of the judiciary is well recognized and ensured (though differently) on both levels,<sup>139</sup> and the judiciary and the prosecution service usually enjoy a professional working relationship. A prosecutor’s duties necessarily involve frequent and regular official contacts with the judges in the prosecutor’s jurisdiction. In such contacts, the prosecutor must strive to preserve the appearance as well as the reality of the relationship required by professional traditions, ethical codes, and applicable law. A prosecutor may not engage in unauthorized *ex parte* discussions with or submission of material to a judge relating to a particular case that is or may come before the judge.<sup>140</sup> In practice, prosecutors and judges know each other well, even in larger jurisdictions. In some jurisdictions, such as Los Angeles County, certain prosecutors are typically assigned to particular court rooms, i.e., the same judge or judges. Even where prosecutors do not work with the same judge on an almost daily basis, they tend to develop good professional working relationships.

DAs generally seek to establish good relations not just with individual judges, but with the judiciary in their jurisdiction and state *per se*, as well as with the individual courts with which they work. A 1999 study of nine trial courts indicated that the most efficient courts could operate in a speedier manner because of better communication and coordination among judges, court staff, and attorneys.<sup>141</sup> DAs also coordinate with the judiciary on justice system reform efforts and legislative proposals that may influence their work. They frequently participate in coordinating councils on the local or state level.

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137 Joan E. Jacoby, *The American Prosecutor, A Search for Identity* (1980).

138 See Oregon Court of Appeals, *State v. Coleman*, 131 Or App 386, 390, 886 P2d 28 (1994), “[T]hroughout Oregon’s history, district attorneys have been regarded as prosecutors for the executive branch.” The disagreement about which branch of government prosecutors belong to is reflected, for example, in the fact that major nationwide websites on justice system matters do not even list prosecution separately, and may classify them alternatively as part of law enforcement or as part of the courts. See, e.g., the website of the National Criminal Justice Research Service, [www.ncjrs.org](http://www.ncjrs.org).

139 For example, once a federal judge is appointed, that person has life tenure and cannot be removed from office unless Congress impeaches and convicts him or her. This is an essential part of the U.S. Constitution, which ensures that the judiciary is an independent and equal branch of the federal government.

140 ABA Prosecution Standards, *supra* note 41, Standard 3-2.8 Relations With the Courts and Bar.

141 Brian Ostrom and Roger Hansen, *Efficiency, Timeliness, and Quality: A New Perspective from Nine State Criminal Trial Courts* (1999), published by the National Center for State Courts.



On the other hand, prosecutors must not appear inappropriately close to judges, in order to avoid conflicts of interest. State ethics rules and interpretations for example prohibit assistant prosecutors from participating in campaign activities on behalf of candidates for public office and DA candidates from being endorsed by judges.<sup>142</sup>

Close relationships may also result when a former prosecutor becomes a judge. Since the legal profession itself is not strictly regulated or clearly hierarchical, private lawyers may become prosecutors or judges, and prosecutors may become judges and vice versa. While a former prosecutor may become a judge, however, the reverse career path is rare (though not impossible).<sup>143</sup>

In the U.S., most assistant prosecutors are not civil servants. In many jurisdictions, assistant prosecutors serve at the pleasure of the chief prosecutor, who will only be in office for the period to which he or she is elected (ranging from 4 to 8 years, though longer if reelected). This, combined with the fact that prosecutors are less well compensated than attorneys in larger law firms, leads to relatively high turnover in prosecutors' offices. In 2001, prosecutors stayed in office an average of 6.5 years.<sup>144</sup> Unlike DAs, judges generally do not have to face competitive re-elections.<sup>145</sup> These factors, combined with the fact that judges probably have the highest status among lawyers in the U.S. (despite often lower compensation), makes becoming a judge a career highlight for many lawyers in the U.S.

The situation is similar on the federal level. While A.U.S.As are federal employees drawing good salaries and benefits and can only be removed for cause, they are still part of the DOJ hierarchy, as are U.S. Attorneys. Federal judges, on the other hand, although appointed in a highly political process, are independent and appointed for life. They are also better paid than U.S. Attorneys. Some federal judges have experience as prosecutors, but few, if any, judges would elect to become prosecutors, as this would be seen as a step backward.

#### 4.5. Relationship with and role of the defense bar

The U.S. constitution provides that the accused shall "have the assistance of counsel for his defense."<sup>146</sup> This right has been interpreted to require that the state provide a defense lawyer for those unable to pay for private counsel. Some states provide adequate public defense services, while others do not.<sup>147</sup> Prosecutors generally recognize that having a competent defense lawyer representing the accused is important for

142 The former is from a New York ethics ruling (1995-675), the latter from Utah (1978-48). See National Center for Prosecution Ethics, [www.ethicsforprosecutors.com/ethics\\_advisory\\_opinions.html](http://www.ethicsforprosecutors.com/ethics_advisory_opinions.html).

143 On the other hand, because DA salaries in some states are set by the county, some DA salaries are higher than those of judges serving in their state. This and the independence of the DA can make it attractive for a judge to run for DA.

144 See Bureau of Justice Statistics, *supra* note 12.

145 For more detail on the election and re-election of state court judges, see Colleen Danos, *Judicial Election reform: Leadership Challenges*, (2001), published by the National Center for State Courts.

146 U.S. Const., Amend. VI.

147 See Bureau of Justice Statistics, *Indigent Defense Services in Large Counties*, 1999 (2000).

the case to proceed efficiently and, more importantly, to protect against wrongful accusations.

The NDAA and ABA Standards require prosecutors to strive to preserve proper relations with members of the defense bar, maintain uniformity of fairness, and cooperate with the defense at all stages of the criminal process.<sup>148</sup> The duty of the prosecutor is to seek justice, not merely to obtain a conviction. The same standard also applies to the defense counsel.<sup>149</sup> This obligation mandates fair, impartial, and professional conduct of all trial proceedings and in all relations with the opposing counsel.

The adversarial form of the trial may create tensions, but in practice, the majority of communications between prosecutors and defense attorneys are courteous and professional, and disagreements are generally of a professional nature. Still, conflicts and communication issues exist in many jurisdictions; difficulty in resolving them generally results from personality conflicts. Complaints of unprofessional or unethical behavior on either side may be made during proceedings to the court or as part of a complaint process before the state Bar Association.

The DA generally seeks the same professional and constructive relationship with the local defenders office, where such exists, and the local defense bar as with other parts of the justice system. Representatives of the defenders office or defense bar may be members of local or statewide criminal justice system councils, and can be important in efforts to increase the efficiency of court processes and in seeking criminal justice reforms. Public defenders services and prosecutors appear to be particularly at odds during budget times, which is largely due to the fact that they compete for the same funding.<sup>150</sup>

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## V. Information Control

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### Public and media relations

*State level:* The general public, civil society, and the media serve as important monitors of prosecutorial behavior and operations. The public holds DAs accountable through elections. Local, state, and even national civil society groups, such as the American Civil Liberties Union (ACLU),<sup>151</sup> frequently follow up on questionable prosecutorial decisions if they receive a complaint. The media generally reports on prosecutorial operations and decisions in cases of interest to the public, frequently

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148 See NDAA Standards, *supra* note 36, Standards 25.1-6.

149 David G. Bress, *Professional Ethics in Criminal Trials*, 64 MICHIGAN LAW REVIEW 1493,1494 (1966).

150 Statewide workload studies have frequently included both prosecution and defense services to address the resource needs of both equally. See, e.g., American Prosecutors Research Institute, *Workload Study for the State of Georgia* (2000).

151 For more information on the role and activities of the ACLU, see [www.aclu.org](http://www.aclu.org).

involving questionable decisions.<sup>152</sup> As the elected official, the DA is generally the “public face” of the office and the person who responds to media inquiries. Particularly in larger offices, media relations and responses to public inquiries are guided by policies, and may be handled by specially designated attorneys or media experts on staff. Offices handling cases that attract special public and media attention may also hire media consultants for advice on responding to or forestalling inquiries.<sup>153</sup>

Media relations can raise particular ethics dilemmas. Release of information during an investigation is generally controlled by the police agency, but upon charging, the authority to release information transfers to the prosecutor. Most state ethics codes require prosecutors to limit the information provided to the media in ongoing cases.<sup>154</sup> Prosecutors must also avoid any appearance that media reports have influenced their decisions. Still, it would be naive to believe that public or media criticism does not influence the prosecutor at all.<sup>155</sup>

As elected officials, DAs are well aware that good public relations are important to ensure public support. Websites and annual reports providing information on an office’s operations and goals are an important element in public relations.<sup>156</sup> In addition, many offices engage with the public through a range of outreach activities that focus on crime prevention and reduction as well as general public education about the law. These include special programs with schools and civic organizations to increase crime awareness and prevent crime.<sup>157</sup>

Most prosecutors work hard to increase public understanding and positive perception of the prosecutor’s role and decisions. As elected officials, the security of their jobs depends on the perception that they are doing them properly. State prosecutors’ organizations may also provide assistance in media relations, for example by providing standard statements and media kits for use by individual offices.<sup>158</sup>

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152 See, e.g., Jennifer Gonnerman, In Albany Primary, a Candidate for D.A. Attacks the Rockefeller Drug Laws-and Wins, *The Village Voice*, September 21, 2004.

153 For more information on handling notorious trials, see T. Murphy, P. Hannaford, G. Loveland, and T. Munsterman, *Managing Notorious Trials* (1992), published by the National Center for State Courts..

154 Most state ethics codes follow the ABA model rules for prosecution. Rule 3.6(a) states: A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

155 Kenneth Bresler, “I Never Lost a Trial.” *When Prosecutors Keep Score of Criminal Convictions*, 9 *GEORGIA JOURNAL OF LEGAL ETHICS* 537 (1996).

156 Two interesting examples of annual reports, available on the offices’ websites, are published by the Dade County (Miami, FL) prosecutor’s office and by the Maricopa County (Arizona) County Attorney’s office. They introduce office goals, operations, and key staff, and present statistics to provide an understanding of the offices’ workloads and their contributions to controlling crime in their jurisdictions.

157 For example, the Prosecutor’s office in Kings County (Brooklyn, NY) informs on its website about many of its programs that engage children and adults actively in crime reduction efforts. See <http://www.brooklynnda.org>.

158 See, e.g., California District Attorneys Association, available at [www.cdaa.org](http://www.cdaa.org).

*Federal level:* Federal guidelines for media and public education provide for balancing three principal interests: the right of the public to know, the individual's right to a fair trial, and the government's ability to effectively enforce the administration of justice.<sup>159</sup> They also give weight to protecting the rights of victims and litigants, as well as the safety of other parties and witnesses. These principles must be evaluated in each case and discretion used, since not every situation can be predicted and covered by written policies. In addition, information disseminated by U.S.AOs is governed by the same state ethics rules and codes that control state prosecutions.

The Manual for U.S. Attorneys provides detailed guidance for any media contacts. The manual specifically prohibits publicizing information with a substantial likelihood of materially prejudicing an adjudicative proceeding. Similarly, matters involving ongoing investigations should not be disclosed, unless they have already received substantial publicity or the community needs to be reassured that appropriate investigations are ongoing. Disclosure of information related to a person's prior criminal record is also restricted.<sup>160</sup>

The Director of the Office of Public Affairs (OPA) has final responsibility for all matters involving the news media and the DOJ; the Attorney General must be kept informed at all times. Responsibility for all matters involving local media is vested in the U.S. Attorney serving the jurisdiction. Each U.S.AO designates one or more persons to act as point of contact on media matters. U.S. Attorneys coordinate their news media efforts with the Director of OPA in cases that go beyond their immediate district or are of national importance and involve nationwide media outlets. Similarly, when OPA issues a news release or conducts a news conference that affects a specific office, it coordinates with the appropriate U.S. Attorney.<sup>161</sup>

All media relations are further influenced by the Freedom of Information Act (FOIA) and related legislation on the state level, which provide public access to DOJ and other agency records.

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## **VI. Use of Statistics and Performance Measures**

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The media and the public act as external monitors of prosecutorial behavior. Statistical information assists with internal monitoring and accountability. Statistical information for prosecutors' offices in the U.S. is publicly available, but detailed statistics that provide a solid overview of prosecutorial activities by crime type (or would capture the many other non-case related activities) are often not readily available on the local level. Offices may publish general filing or disposition statistics for felonies and

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<sup>159</sup> See U.S. Attorneys' Manual, *supra* note 52.

<sup>160</sup> See U.S. Attorneys' Manual, *supra* note 52.

<sup>161</sup> For information on the public relations activities of individual U.S.AOs, see, e.g., Colorado: [www.usdoj.gov/usao/co](http://www.usdoj.gov/usao/co) and New Jersey: [www.usdoj.gov.usao/nj](http://www.usdoj.gov.usao/nj).

misdemeanors and provide overall conviction rates, but more detailed information is rarely collected and analyzed for publication, or even to inform management about office and attorney performance. Not all offices recognize the value of collecting statistics for management purposes or may not have the resources to collect and assess such data regularly. Additionally, such statistics are not easily analyzed and are difficult to compare with other jurisdictions, especially since no national benchmarks exist.

For example, one measure frequently used to support budget requests and identify efficiency is the caseload of the office and individual prosecutors. It is estimated that local prosecutors' offices in the U.S. handled over 2.3 million felonies and close to 7 million misdemeanor cases in 2001.<sup>162</sup> The number of cases handled by prosecutors will, however, vary due to many factors. A small office with a part-time DA in a jurisdiction with a few thousand people may receive only 10 or 20 felony cases a year, while in large metropolitan jurisdictions, an assistant prosecutor may process up to 500 cases a year. An assistant's caseload will vary depending on the type and seriousness of cases. Misdemeanor cases generally require less time than felonies. Since over 90 percent of cases are resolved by plea, prosecutors may not even spend much time on felonies, unless they go to trial. This means that overall caseload alone does not reflect the true effort required for processing cases by office or by prosecutor.

In addition, caseloads and changes to them depend on many external factors, often outside the control of the office.<sup>163</sup> It may be difficult to discern the impact of each of these factors. More importantly, such figures do not assist in establishing what impact an increase in cases handled has on the ability of the office to process all cases.

If a decline in violent crimes and increase in property crimes, for example, means that the office handles fewer serious cases than before, the shift in caseload may well be absorbed with current staffing.<sup>164</sup>

Another measure frequently cited as a performance measure is the conviction rate. This is a similarly poor measure of performance. In 1996, in at least half of all offices, 88 percent of cases resulted in felony or misdemeanor convictions, and the median conviction rate for felony cases was 89 percent.<sup>165</sup> But this high conviction rate is likely the result of the high degree of prosecutorial discretion in the U.S. Prosecutors generally do not file cases that have no chance of success, and the plea bargaining process almost eliminates less-substantiated charges.

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<sup>162</sup> See Bureau of Justice Statistics, *supra* note 12.

<sup>163</sup> For example, the Maricopa County (Phoenix, Arizona) Attorney's Office reported an increase in case filings from 28,411 to 30,633, or about 8%, between 2001 and 2002. At the same time, the county's population increased by 7.6% and the overall crime rate by 3.5%. The violent crime rate decreased by 2.2%, while the property crime rate increased by 4.1%. The increase in filings mirrors, but is also higher than, the increase in population and crimes, and could be a result of more suspects arrested by the police (due to policy changes within the police or increased number of officers on the streets), a change in prosecutorial policy, or a combination thereof. See [www.maricopacountyattorney.org/Newsletters/default.asp](http://www.maricopacountyattorney.org/Newsletters/default.asp).

<sup>164</sup> Maricopa County is one of the larger prosecuting attorney's offices in the U.S. The above statistics alone do not even indicate if the office is adequately staffed and/or operating efficiently.

<sup>165</sup> See Bureau of Justice Statistics, *supra* note 12.

While many prosecutors appear interested in measuring office performance, few follow a formal process of setting goals for prosecution and measuring progress towards them.<sup>166</sup> Establishing performance measures is not easy, particularly for services like prosecution in which results are not always tangible or quantifiable. Unlike state courts, which have been developing meaningful national performance standards for almost 20 years,<sup>167</sup> prosecutors have only recently begun to engage in such efforts.<sup>168</sup> Workload assessments have been conducted in a number of states to capture the true level of effort required for all the work prosecutors engage in and to provide a more precise measure for assessing staffing needs and estimating efficiencies across offices.<sup>169</sup> Offices are also increasingly trying to establish overall goals, such as “user” satisfaction and timeliness, and seeking to measure them through a range of methods.

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## VII. Trends

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Prosecutors’ offices in the U.S. are constantly challenged to keep pace with the ever-changing needs of the diverse U.S. society. Prosecutors’ offices in the U.S. not only establish a range of specialized programs to address the needs of particular population (and victim) groups, but seek to apply modern management approaches and technology to assist them in their efforts.

*Office automation.* Technology plays an increasingly important role in ensuring that prosecutors’ offices are well managed, work efficiently, and provide quality services in a timely manner to their “clients.” Case management software, linkages to police, courts, and other justice sector agencies, electronic file management that allows for creating and securely sharing multi-media case files, and archiving software, in addition to legal research software, are increasingly found in prosecutors’ offices.<sup>170</sup>

Statewide case and management information systems are still lacking in many states, or have limited capabilities because certain information is not collected or systems are not integrated; however, many prosecutors’ offices have improved their efficiency

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166 A 1995 study in Minnesota found that about 55% of county attorneys and 50% of city prosecutors had or were developing informal methods for measuring office performance. Only 3% of county attorneys and no city prosecutors indicated they followed a formal process of setting goals and objectives for misdemeanor prosecution. Minnesota Office of the Legislative Auditor, *supra* note 38.

167 See National Center for State Courts, *Trial Court Performance Standards*, available at [www.ncsconline.org/D\\_research/TCPS/index.html](http://www.ncsconline.org/D_research/TCPS/index.html).

168 For recent developments in national performance measures for the juvenile justice system, including juvenile prosecution, see Caren Harp, *Spotlight On: Performance Measures for the Juvenile Justice System: A National Demonstration Project*, IN RE vol. 6 (2003), and American Prosecutors Research Institute, *Prosecution in the 21<sup>st</sup> Century* (2004).

169 Such studies have been conducted in Delaware, Georgia, Michigan, North Carolina, and Tennessee, among others. For more detail on workload assessments, see Heike Gramckow, *supra* note 85.

170 See Bureau of Justice Statistics, *supra* note 12.



and accuracy by computerizing case management.<sup>171</sup>

Developing a case management system is related to the development of an information sharing system. Case management systems are primarily designed to assist prosecutors in tracking cases through the system, identifying where in the process a particular case is, and determining what actions need to be taken. Further, management decisions (e.g., staffing, caseload allocation, and budget allocation) may be supported by the type of information available from case management systems. However, to support policy decisions or decide what actions to take and how to respond in a specific case, both offender and case information are needed. If both systems—case management and offender information—are combined, this provides the most comprehensive information support for line operations and management.<sup>172</sup>

Prosecution offices that use computerized systems are generally able to automatically produce letters, disposition reports, and other documents without re-entering pertinent data; monitor information on victims and witnesses; and communicate electronically with other agencies, thereby increasing their efficiency.

Linkages to electronic criminal records databases for checking and updating are essential for prosecutorial decision making. Portable solutions such as laptops and palm pilots provide access to case files, legal documents, and up-to-the minute calendar management even in the courtroom.

*New Roles for Prosecutors.* Community prosecution strategies signal a major milestone in changing the culture and role of the prosecutor by developing partnerships and collaborative, problem-solving approaches with the community and other agencies.<sup>173</sup> Community prosecution models in the U.S. vary widely. Just as police created different forms of community policing, prosecutors' initiatives reflect the requirements of their own jurisdictions. Some prosecutors decentralized their offices to better respond to the needs of individual neighborhoods. Others placed specialized "community prosecutors" in selected areas to work closely with the residents and other agencies on crime prevention and/or identifying community problems to develop coordinated responses.<sup>174</sup> Assessments of these programs indicate increased

171 See, e.g., Minnesota Office of the Legislative Auditor, *supra* note 38.

172 Office of Juvenile Justice and Delinquency Prevention., *Enhancing Prosecutors' Ability To Combat and Prevent Juvenile Crime in Their Jurisdictions*, JAIBIG BULLETIN 1999. For example, in Miami, a computerized records database for the Felony Records Center was created and has been continuously updated and enhanced since 1993. The ability to access file locations with the touch of a button allows staff to quickly identify where cases files are located, saving precious time. In addition, the data inputting and bar-coding of over 300,000 felony case files enabled the office to query records in the system, determining their location and giving personnel the ability to order the files electronically. For a brief description of an automated work-management system in Michigan prosecutors' offices, see <http://www.michiganprosecutor.org>.

173 In 2001, 23% of all offices reported assigning prosecutors to handle community-related activities. 55% involved the community to identify crime or problem areas. See Bureau of Justice Statistics, *supra* note 12.

174 Heike P. Gramckow, *Community Prosecution in the U.S.*, 5 EUROPEAN JOURNAL ON CRIMINAL POLICY AND RESEARCH 9-26 (1997). For additional information on different types of community prosecution efforts established in the U.S., see by J.S. Goldkamp, C. Irons-Guynn, and D. Weiland, *Community Prosecution Strategies: Measuring Impact*, BJA BULLETIN (2002).



community satisfaction with the office and reduction of crime and order problems in the target areas.<sup>175</sup>

*Victim and witness assistance.* Prosecutors' offices, more than any other criminal justice agencies, have been assigned the responsibility for creating and implementing assistance programs that provide victims and witnesses with information, the opportunity for increased participation in the justice process, and access to services. Prosecutors have a vested interest in facilitating victim participation in, and satisfaction with, the criminal justice process. Prosecutions can quickly be rendered ineffective if victims and witnesses are frustrated by insensitive treatment and unwilling to report criminal activity, testify as witnesses, or work cooperatively within the system.<sup>176</sup>

Many prosecutors' offices are incorporating victim assistance services as part of regular operations rather than delegating them to a separate program or agency.<sup>177</sup> Advocates act as liaisons for the victim and prosecutor, relaying important information between both parties and insuring that victims and witnesses appear at trial, which frees the prosecutor to focus on bringing offenders to justice.<sup>178</sup>

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175 See Goldkamp et al., *id.*

176 Office for Victims of Crime, *A Victim's Right to Speak—Impact Statements—A Nation's Responsibility to Listen* (2001).

177 In 2001, 6% of offices report having a victim/witness advocate on staff. Bureau of Justice Statistics, *supra* note 12.

178 See Office for Victims of Crime, *supra* note 176.

## Attachment A

Excerpt from the U.S. Attorneys' Manual

[http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title1/4mdoj.htm#1-4.320](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title1/4mdoj.htm#1-4.320)

### **1-4.000 STANDARDS OF CONDUCT**

#### **1-4.410 Restrictions on all Employees**

Employees in the Department of Justice may not:

- A. Use their official authority or influence to interfere with or affect the result of an election (5 U.S.C. § 7323(a)(1).
- B. Solicit, accept or receive a political contribution (5 U.S.C. § 7323(a)(2), except for a political contribution to a multi-candidate political committee from a fellow member of a federal labor organization or certain other employee organizations, as long as the solicited employee is not a subordinate and the activity does not violate G below.
- C. Solicit, accept, or receive uncompensated volunteer services from an individual who is a subordinate (5 C.F.R. § 734.303(d)).
- D. Allow their official titles to be used in connection with fundraising activities (5 C.F.R. § 734.303(c)).
- E. Run for nomination or election to public office in a partisan election (5 U.S.C. § 7323(a)(3)), except that in certain designated communities an employee may run for office in a local partisan election but only as an independent candidate and may receive, but not solicit, contributions. 5 C.F.R. § 733.107 lists these communities.
- F. Solicit or discourage the political activity of any person who is a participant in any matter before the Department (5 U.S.C. § 7323(a)(4)).
- G. Engage in political activity (to include wearing political buttons), while on duty, while in a government occupied office or building, while wearing an official uniform or insignia, or while using a government vehicle (5 U.S.C. § 7324(a).
- H. Make a political contribution to their employer or employing authority (18 U.S.C. 603).

#### **1-4.420 Restrictions on Career SES, Criminal Division, and FBI Employees, and all Political Appointees**

These employees may not:

- A. Distribute fliers printed by a candidate's campaign committee, a political party, or a partisan political group.
- B. Serve as an officer of a political party, a member of a national, state, or local committee of a political party, an officer or member of a committee of a partisan political group, or be a candidate for any of these positions.
- C. Organize or reorganize a political party organization or partisan political group.
- D. Serve as a delegate, alternate, or proxy to a political party convention.
- E. Address a convention, caucus, rally, or similar gathering of a political party or partisan political group in support of or in opposition to a candidate for partisan political office or political party office, if such address is done in concert

- with such a candidate, political party, or partisan political group.
- F. Organize, sell tickets to, promote, or actively participate in a fund-raising activity of a candidate for partisan political office or of a political party or partisan political group.
  - G. Canvass for votes in support of or in opposition to a candidate for partisan political office or a candidate for political party office, if such canvassing is done in concert with such a candidate, political party, or partisan political group.
  - H. Endorse or oppose a candidate for partisan political office or a candidate for political party office in a political advertisement, broadcast, campaign literature, or similar material if such endorsement or opposition is done in concert with a candidate, political party, or partisan political group.
  - I. Initiate or circulate a partisan nominating petition.
  - J. Act as a recorder, watcher, challenger, or similar officer at polling places in consultation or coordination with a political party, partisan political group, or a candidate for partisan political office.
  - K. Drive voters to polling places in consultation or coordination with a political party, partisan political group, or a candidate for partisan political office.
  - L. Run as partisan candidates for local partisan political office even in those communities listed in 5 C.F.R. § 733.107 in which other Department of Justice employees may run for office. However, they may run as independent candidates in a partisan political election for a local office in the municipality or political subdivision, except for those appointed by the President with the advice and consent of the Senate. *See* 5 C.F.R. 733.105(b) and (c)(1).

The restrictions listed above A through L apply only to Career SES, Criminal Division, FBI Employees, and all Political Appointees, and are permissible activities for all other employees.

#### **1-4.430 Permissible Activities**

All employees may:

- A. Register and vote in any election.
- B. Express opinions as individuals on political subjects and candidates privately and, to the extent consistent with the restrictions above, publicly.
- C. Display a political picture, sticker, badge, or button in situations that are not connected to their official duties, but employees restricted as outlined in 1-4.420 may not distribute such material.
- D. Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization.
- E. Be members of a political party or other political organization and participate in its activities to the extent consistent with the restrictions set forth above.
- F. Sign a political petition as individuals.
- G. Make a financial contribution to a political party or organization, except to one's federal employer.
- H. Take an active part, as a candidate or in support of a candidate, in a nonpartisan election.
- I. Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of

- a municipal ordinance or any other question or issue of a similar character.
- J. Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by state or local law, subject to the restrictions set forth above about certain employees not undertaking such activity in concert with political entities.
- K. Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise their efficiency or integrity as employees or the neutrality, efficiency or integrity of their agency.

#### **1-4.440 Political Referrals**

In addition to restricting or limiting certain political activity, the Hatch Act also prohibits selecting officials or others involved in the examining or appointing process for competitive service positions from receiving or considering a recommendation of an applicant from a Senator or Representative, except as to the character or residence of the applicant, unless the recommendation is based on personal knowledge or records of the sender. In no case are U.S.AOs required to return a letter to the sender even if it does not meet the requirement stated above. Additional guidance on this is available from the EO.U.S.A Office of Legal Counsel.

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## Project team Biographies

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**Anton Girginov** is a public prosecutor at the Supreme Cassation Prosecution Office. He controls pre-trial investigations of different criminal offences and participates in international judicial cooperation in criminal matters. Anton Girginov has also worked for UN as an International Prosecutor in East Timor and Head International Trainer in Kosovo. After completing his law studies at Sofia University he obtained a Ph. D degree and became an associated professor and later, full professor of substantive criminal law. He gives lectures at the Plovdiv University and at the Southwest University, Blagoevgrad. Anton Girginov is the author of more than 90 academic publications in the area of criminal law, eleven books among them.

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**Anton du Plessis** is head of the International Crime in Africa Programme (ICAP) at the Institute for Security Studies in South Africa. Until February 2008, Anton was a terrorism prevention expert in the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime (UNODC) in Vienna. Prior to joining the UNODC, Anton was head of the Crime and Justice Programme at the ISS. In these positions, he has been a regular commentator in local and international media, both electronic and written. Anton is also an admitted advocate of the High Court of South Africa and has worked as a senior prosecutor for the National Prosecuting Authority (NPA) of South Africa. In 2002, he was appointed as a Senior State Advocate and head of the NPA's Sexual Offences Section. Anton has published and edited numerous publications, and has presented research papers at several local and international conferences. He is a member of several editorial committees and advisory councils and boards. He holds the following law degrees: B-Iuris, LL.B. and LL.M. (with specialisation in criminal law and human rights—*cum laude*).

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**Barry Hancock** is a Solicitor of the Supreme Court of Judicature. He is a career prosecutor until 1990 when he became Head of Personnel and Training for the Crown Prosecution Service (CPS). In 1996 he helped develop the new inspectorate for the CPS and was appointed Senior Inspector. Having been involved in the establishment of the International Association of Prosecutors (IAP) he was appointed General Counsel in 1998 and went on to run its international conferences, edit and write its documents and co-ordinate its project work. Having retired from this post in 2007, he now represents the IAP in an advisory capacity. He was editor of the IAP's *Directory of Prosecution Services*, its *Newsletter* and electronic *Journal* as well as being co-editor of its *Human Rights Manual for Prosecutors* which has been translated into six languages. From 2003

to 2006 he was an Associate Research Fellow at the Institute of Advanced Legal Studies at the University of London. Barry Hancock is a member of the Management Board of the Public Prosecution Service for Northern Ireland and of the U.K. Attorney General's Advisory Board on Human Rights Guidance for the criminal justice system in Northern Ireland.

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**Belinda Cooper** is a senior fellow at the World Policy Institute in New York and an adjunct professor at New York University's Global Affairs Program. She teaches and lectures on human rights, international law, and transitional justice and is the editor of "War Crimes: The Legacy of Nuremberg," which explores the inter-connections between the Nuremberg tribunal and today's international criminal tribunals. Cooper lived in Berlin, Germany from 1987-1994 and returned in 2002 as a fellow at the American Academy in Berlin. She has taken part in human rights fact-finding missions and has coauthored reports on domestic violence in Armenia, Uzbekistan, and Tanzania. Cooper has written for a wide variety of publications in German and English, including *The New York Times*, *Newsweek*, *World Policy Journal* and the *Christian Science Monitor*. She is also a translator of German scholarly books and articles, including most recently a textbook on international criminal law. Professor Cooper graduated *summa cum laude* with her B.A. in History from Yale College and received her J.D. from Yale Law School.

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**Cristián Riego** is an Academic Director of the Center for Justice Studies of the Americas and Professor in Diego Portales Law School in Santiago. He is an attorney and earned his degree from the University of Chile. He has a master of law degree from the University of Wisconsin. He was an investigating attorney at the Chile's National Truth and Reconciliation Commission from June 1990 to February 1991 and an Advisor to the Paz Ciudadana Foundation. He was a member of the Higher Council of Educare University (1994-1996) and Advisor to the Department of Justice during the proceedings and negotiation of the Criminal Procedure Reform in the National Congress (1995-1996). He was a member of the team that wrote the Juvenile Justice Reform project at the request of the Department of Justice. He has provided advisory service on numerous Judicial Reform projects in Uruguay, Paraguay, Venezuela, Panama, and El Salvador, and was Advisor to the Chilean Department of Justice for the preparation of a general implementation plan for the criminal procedure reform in 1997.

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**Daniela Cavallini** is a lawyer and researcher at the Center for Judicial Studies (C.E.S.R.O.G.), University of Bologna. She made some studies on the status of judges and prosecutors in Italy (principle of immovability, disciplinary responsibility) and participated in various research projects on judicial systems, such as the research on "Recruitment, professional evaluation and career of judges and prosecutors in Austria, Germany, France, The Netherlands, Italy and Spain", directed by prof. G. Di Federico. At present her main interests are: the reform of

the disciplinary responsibility of judges and prosecutors in Italy; status and disciplinary responsibility of lay judges in Italy (giudice di pace, giudice onorario di tribunale, etc.); structure and composition of courts in Europe. Some of her publications are: “Inamovibilità dei magistrati e funzionalità degli uffici giudiziari. Tendenze in atto”, *Rivista trimestrale di Diritto e Procedura civile*, 2003, pp. 1043-1078; “La giurisprudenza disciplinare sui ritardi dei magistrati ordinari nell’espletamento delle attività giudiziarie”, *Rivista trimestrale di Diritto e Procedura civile*, 2004, pp. 1489-1528; “Provision of Information by Courts, the Case of Italy”, in P.M. Langbroek and W.J.M. Voermans (eds.) “Provision of Information by Courts and Courts administrations: a comparative inventory of eight European Countries and in the USA”, Universiteit Utrecht, 2005, pp. 67-77; “Il giudice onorario di tribunale: quali limiti alle sue funzioni?”, *Rivista trimestrale di Diritto e Procedura civile*, 2007, pp. 199-223.

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**Prof. Ekaterina Trendafilova** is elected for a nine-year term as a judge at the International Criminal Court. She has extensive experience in criminal law, criminal procedural law and international criminal law. She has been a Professor at Sofia University of criminal justice since completing her PhD in 1984. She has also experience as a human rights expert. She is a member of the Bulgaria Union of lawyers and a member of the Bulgarian Union of Scholars. She was called to the Bar of Bulgaria in 1995. She chaired the working group that prepared the reform of the Bulgarian criminal procedure code in line with the European and international standards for efficient administration of justice and protection of human rights (1998-1999). She was a deputy district attorney at Sofia District Court (1985-1989) and represented Bulgaria to the UN Commission for Crime and Criminal Justice (1992-1994). She chaired the Criminal Division of the Legislative Consultative Council in the Bulgarian Parliament. She has publications in Bulgaria and abroad in the field of human rights law, international criminal law and procedural law.

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**Dr. Endre Z. Bócz** joined the Hungarian Public Prosecution Service in 1961, and had served for 40 years at the Budapest Chief Public Prosecution Office. As a prosecutor, in 1976 he received a PhD degree in law and in 1979 he was appointed deputy head of the Budapest Chief Prosecution Office. In 1990 he became the chief prosecutor of Budapest. He was the founder of the International Association of Prosecutors and had been its vice-president for three years (1995-1998). From 2002 to 2004 he was also a senior adviser to the minister of justice. He has been a professor of penal law at the Budapest and Pécs Universities ((1997-2002), Head of the Department of criminology at the Hungarian Police Academy and Head of the Institute of Penal and Criminal Procedural Law at the Juridical Faculty of the „Károli Gáspár” University of the Reformed Church. He has participated in several expert committees responsible for making draft recommendations at the Council of Europe. He has taken part in the preparation of the Hungarian Penal Code (1973-1978) and the Code of Criminal Procedure (1990-1998). He has published several books and many case studies of inves-



tigations and has a large number of publications on problems of the penal and criminal procedural law.

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**François Falletti** is “Avocat general” at the French Court of Cassation and National Member for France at Eurojust. He has a 30 year experience of prosecutor acting in court and at the French ministry of justice where he has been “Directeur des affaires criminelles et des graces” from 1993 to 1996 before being appointed Chief prosecutor of the Court of Appeal of Lyon where he stayed until he joined Eurojust in September 2004. In his former positions he has been in charge of very wide range of cases and issues especially related to economic offences and MLA. He has worked for many years at the French ministry of Justice where he has participated in the drafting of many bills related to economic and financial offences, and has been involved for several years in the draft of the new criminal code (1994). He has been involved in many negotiations at international level, for instance as expert in the financial action task force set up in 1989 or in the frame of the Council of Europe, the EU and the UN. He has also been involved in the activities of organizations of prosecutors acting at european and international level. He is President of the International Association of Prosecutors. He is teaching on criminal law. He is the author of many articles on international law and of several books on criminal law.

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**Giuseppe Di Federico** is a Law Professor emeritus of the University of Bologna, Director of the Research Institute on Judicial Systems of the Italian National Research Council ([www.irsig.cnr.it](http://www.irsig.cnr.it)), former member of the Italian Superior Council of the Magistracy. He is the author of many books and articles on the judicial systems of democratic countries.

He has an extensive experience as consultant for judicial reforms in several countries: in Eastern Europe and Russia, in South America and in South East Asia: He has conducted most of these activities under the auspices of international organizations such as the World Bank, the United Nations Development Programme, The United Nations Office on Drugs and Crime.

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**Dr. Heike Gramckow** has over 20 years of experience in working with courts, prosecutors, and police internationally. Her particular focus is on justice system management. She has global experience in guiding justice sector reform projects, and provided technical assistance and training in the field. She directed several international reform projects and justice system assessments in countries as divers as Egypt, Haiti, Indonesia, Mongolia, Nigeria, Serbia, and the United Arab Emirates, among others. She worked with common and civil law systems as well as with Shari’a courts and traditional justice systems.

Before joining the Justice Reform Practice Group of The World Bank in Washington, DC as Senior Counsel in early 2008, Dr. Gramckow was the Deputy

Director of International Programs for the National Center for State Courts. From 1997 to 2000 she was a director with the American Prosecutors Research Institute, where she led prosecutor-related projects, including training, audits of prosecutor operations, and program evaluations. Before that she worked in US-based research and consulting firms conducting applied research related to justice system organizations. She taught courses on international criminal justice systems and juvenile justice at American University in Washington, DC and courses on deviance and control at George Washington University. She is widely published in the US and abroad.

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**James Lackner** is an Assistant United States Attorney with the U.S. Attorney's Office, District of Minnesota, a position he has held for approximately 25 years. He has prosecuted a wide variety of criminal cases. He graduated from Northwestern School of Law in 1978. He acted as a consultant in his individual capacity.

The views expressed in this book do not necessarily represent the views of the Department of Justice, the U.S. Attorney's Office or Mr. Lackner.

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**Joachim Herrmann** is a Professor emeritus of Law, University of Augsburg, Faculty of Law, Augsburg, Germany, Dr. jur., LL.M. Attorney at Law, Augsburg. He was a visiting professor of law: University of Michigan, University of Chicago, University of Virginia, University of California - Davis, Pittsburgh University, Beijing University, Tokyo University, Waseda University, Tokyo, University of South Africa, University of Pretoria. Main academic interests and publications in the fields of criminal law, criminal procedure, comparative legal systems, especially the characteristic features of continental European Law and Anglo-American Law, former Socialist Law, Islamic Law, Chinese Law, and Japanese Law.

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**Professor Károly Bárd** is the chair of the Human Rights Program of the Central European University (Budapest). He started his career at the Faculty of Law of Eötvös Loránd University Budapest. Between 1990 and 1997 he served as vice-minister and later as deputy state secretary in the Ministry of Justice of the Republic of Hungary. Professor Bárd is a member of the Board of Directors of the European Institute for Crime Prevention and Crime Control affiliated with the United Nations (HEUNI). Currently he serves as Pro-rector for Hungarian and European Union Affairs of the Central European University.

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**Martin Schönteich** is the Senior Legal Officer: National Criminal Justice Reform, for the Open Society Justice Initiative. He previously worked as a Senior Researcher for the Institute for Security Studies' Crime and Justice Programme in Pretoria, South Africa. He has also worked as Parliamentary Affairs Manager for the South African Institute of Race Relations where he undertook policy-

related advocacy and research work on issues affecting criminal justice and civil liberties in South Africa. After completing his law degree he worked as a Public Prosecutor for the South African Department of Justice. He is an Advocate of the High Court of South Africa.

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**Mirna Goransky** is Deputy Prosecutor at the Attorney General Office in Buenos Aires, Argentina, where she works on the reorganization of the prosecutors' offices, including the design and replication of decentralization experiences. Currently on leave, she is working on a research on the organization of prosecutors' offices in Argentina, Chile and the US to propose a set of guidelines for better functioning in accordance with human rights standards. She has published various articles on the administration of justice, criminal law and procedure and human rights.

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**Rada Smedovska** is a Senior Fellow Legal Research at RiskMonitor Foundation ([www.riskmonitor.bg](http://www.riskmonitor.bg)). She studied law at the University for Law and Political Science in Clermont-Ferrand, France and obtained a Master degree on internal public law in 2002. Between 2002 and 2007 she was a coordinator at the Legal program of Open Society Institute Sofia. Her professional experience includes constitutional and judicial reform, special institutions for combating organized crime and democratic control over security services. She has several publications in Bulgarian and French in the field of constitutional policy, judicial and security sector reform.

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**Robert M. A. Johnson** is Anoka County Attorney from 1983 to the present. He is past-president of the National District Attorneys Association. He is a member of the American Bar Association and past-chair of the Criminal Justice Section. He is an Advisor to the American Law Institute—Model Penal Code: Sentencing. He served as Chair of the Minnesota Financial Crimes Task Force. He served on the Board of Governors of the Minnesota State Bar Association and is past-president of the Minnesota County Attorneys Association and the Anoka County Bar Association. Mr. Johnson was granted his BSB, University of Minnesota, 1965, and his JD, University of Minnesota Law School, 1968. He was called to the Bar of State of Minnesota, 1968; U.S. District Court, District of Minnesota, 1971; and U.S. Court of Appeals for the Eighth Circuit, 1975.

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**Todd Foglesong** is a Senior Research Fellow at the Kennedy School of Government and Coordinator of the Justice Systems Workshop for the Program in Criminal Justice Policy and Management ([www.ksg.harvard.edu/criminaljustice](http://www.ksg.harvard.edu/criminaljustice)). Todd's research focuses on the use of arrest and pretrial detention around the world and the alignment of efforts across government agencies to provide public safety and justice. Prior to joining the program at Harvard, Todd worked at the Vera Insti-

tute of Justice in New York City ([www.vera.org](http://www.vera.org)). Before that, he was an assistant professor of political science at the University of Kansas. With Peter Solomon, he wrote *Courts and Transition in Russia: The Challenge of Judicial Reform* (Westview, 2000) and *Crime, Criminal Justice, and Criminology in Ukraine* (National Institute of Justice, 2001). Todd Received a B.A. in Russian and Economics from Bowdoin College and an M.A. and Ph.D. in Political Science from the University of Toronto. He is a member of the board of RiskMonitor, a non-governmental research center in Sofia, Bulgaria, that supports better public policies on organized crime and institutional corruption. He speaks Russian and Spanish.

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**Werner Róth** studied law at the universities of Frankfurt am Main, Vienna and Mainz. From 1964 he was employed by the State of Hessen, first as a public prosecutor in charge of the prosecution of Nazi crimes and later at the Hessian Ministry of Justice responsible for the organisation of the public prosecution services. From 1979 until his retirement in 2001 he headed the public prosecution office of Wiesbaden. Since his retirement he has been working as a lawyer in Frankfurt am Main. For thirty years he worked as examiner at the Second State Law Examination in Hessen and is also a co-founder of the International Association of Prosecutors. In addition he regularly gives lectures for prosecutors and judges in Eastern Europe and China.

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**Yonko Grozev** is a lawyer and Program Director with the Centre for Liberal Strategies since 2005. Between 1995 and 2005 he was the head of the Legal Defence Programme of the Bulgarian Helsinki Committee. He has filed and won a large number of cases before the European Court of Human Rights on, among others, the right to life, prohibition of torture, fair trial, freedom of speech, religion and association and the prohibition of discrimination on ethnic grounds. In addition to his international and domestic litigation work, he has been active in research and advocacy on improving the work of the justice system in Bulgaria. He has also been active in providing trainings to lawyers in Central and Eastern Europe on litigation techniques before the ECHR. He is a graduate of the Harvard Law School.

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JUSTICE

This book represents a comparative research of the prosecution institution in nine different countries. The main objective of the comparative analysis is to identify the international standards and best practices in terms of accountability, effectiveness and independence of the prosecution services. The study should guide and enrich national debates in countries where the prosecution needs to be reformed.

In the last twenty years there have been significant changes in criminal procedure and in public prosecution in many parts of the world. The reports included in the volume aim, in part, to examine some important instances and examples of that trend. The country reports represent a broad range of practices and approaches about the manner of organization of the prosecution service. The focus of the research is on the lessons learned from the reform in democratic states and the challenges for the countries in transition in designing the prosecution institution.

The comparative research shows that there is not a universal model of prosecutorial independence and accountability. Hence, the reformers and decision makers have on their disposition a large variety of approaches to choose from on the occasion of a concrete reform. However, they should have in mind an important finding of the comparative analysis, namely—importing an apparently successful element of a reform should not necessarily produce the expected positive results.